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British Columbia

Report on

Foreign Money Liabilities

LAW REFORM COMMISSION OF BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL

LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON FOREIGN MONEY LIABILITIES

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The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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To the Honourable Brian R. D. Smith, Q.C.,
Attorney General of the Province
of British Columbia

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON
FOREIGN MONEY LIABILITIES

In 1975, in what has been described as "a remarkable piece of judicial lawmaking" the English House of Lords radically altered the law concerning foreign money liabilities. They held that a litigant, suing for a sum properly expressed in a foreign currency, should be entitled to enter judgment in that currency. The former rule required that judgment be entered in sterling, converted from the foreign currency at the exchange prevailing as of the date of breach. This change in the law, which had been advocated for many years by knowledgeable commentators, has been well received by the commercial community in England and appears to have worked well in practice.

In this Report, the English developments are examined in a Canadian context, and recommendations are made aimed at achieving similar reforms through legislation.

Among the most troublesome legal issues the courts must face are those raised in cases having a "foreign" element. The size and complexity of the body of law known as "conflict of laws" or "private international law" is ample evidence of this. A particular kind of "foreign" element that has received considerable judicial and academic attention in the last ten years arises where the currency in which a person's claim is asserted differs from the currency of the forum in which the claim is litigated. Three examples illustrate the way in which this might occur.

EXAMPLE NO. 1

D, a British Columbia businessman, contracts with P, a Utopian manufacturer, to buy certain goods, made to D's specification. D is to take delivery of the goods in Utopia and pay the purchase price of 20,000 rallods (the currency of Utopia) within 60 days of delivery. The contract stipulates that it is governed by Utopian law. D takes delivery of the goods but fails to pay the purchase price.

EXAMPLE NO. 2

D and P enter into the contract described in Example No. 1 but D refuses to take delivery of the goods. P mitigates his losses by reselling the goods for 10,000 rallods to another purchaser.

EXAMPLE NO. 3

D, a British Columbia resident, while on a motoring holiday in Utopia negligently damages an automobile belonging to P, a Utopian resident. P must spend 1000 Utopian rallods for repairs.

If, in these examples, P pursues his claim against D in the British Columbia courts, what technique should be adopted to measure that claim and give P the relief he seeks?

The existence of the Canadian dollar cannot be entirely ignored. P may be forced, ultimately, to rely on execution measures, such as the seizure and sale of D's property, and the reality is that such procedures are designed to yield Canadian dollars. At some point, therefore, it is necessary to identify the amount of Canadian dollars that are sufficient to satisfy P's claim.

The conversion of P's claim in Utopian rallods into Canadian dollars will not be a contentious issue if the exchange rate is stable. If, however, between the time P's claim arose and the time it was satisfied the exchange rate has fluctuated, the effective time of conversion may be of critical importance. If the rallod has increased in value relative to the dollar over this time it will be in P's interest to seek conversion as late as possible so as to recover the largest number of dollars. D, however, would seek to minimize that recovery and advocate an effective date of conversion that is early as possible. If the rallod has declined in value relative to the dollar the positions are reversed. P's recovery would be maximized by selecting an early conversion date while D would advocate conversion at a late time.

There are four dates that have significance in claims of this kind, each of which might be selected as defining the exchange rate that should govern P's recovery.

(a) The date on which P should have been paid or on which P incurred his loss (date of breach)

(b) The date on which P commences proceedings against D to enforce his claim (date of writ)

(c) The date on which P recovers judgment against D in a British Columbia court (date of judgment)

(d) The date on which P's judgment is satisfied (date of payment). This choice would necessarily call for a power in the British Columbia courts to award a judgment framed, at least in part, in terms of a foreign currency.

The Canadian courts have generally adopted the date of breach as defining the appropriate rate of exchange. This preference rests on the adoption of the reasoning in certain older English cases, and on the effect of Canadian statutes that touch on currency matters. Until about ten years ago the English courts also followed the date of breach rule. A recent series of cases, however, has radically changed the position. The English courts will now permit a judgment to be entered directly in a foreign currency whether the claim is based on tort, damages for breach of contract or an unpaid debt. They have, in effect, adopted a date of payment rule. The Canadian position and the English developments are discussed in greater detail in subsequent chapters.

Finally, it might be noted that the recent English cases have raised a secondary issue: in which of two or more foreign currencies should the plaintiff's loss be measured? A further example will illustrate the point:

EXAMPLE NO. 4

D, a British Columbia resident, while on a motoring holiday in Utopia negligently damages an automobile belonging to P, a resident of Ruritania who is on a similar holiday in Utopia. Repairs are effected in Utopia at a cost of 1000 Utopian rallods. P purchases the rallods to pay for his repairs with 2000 talers (the currency of Ruritania). Some time later P sues D in a British Columbia court but in the meantime the rallod and the taler have fluctuated with respect to the Canadian dollar and with respect to each other.

If the British Columbia court follows the date of breach rule this example poses no difficulty. The same amount of Canadian currency would normally have been sufficient to buy 1000 rallods or 2000 talers at the time the damage was incurred. This will not necessarily be true at the date of writ, judgment or payment.

If the court adopts one of these dates as appropriate for conversion it will be forced to choose between the rallods and talers as the currency in which P's loss was sustained.

CHAPTER II THE LEGAL BACKGROUND TO 1970

A. England

Until the beginning of the last decade the Anglo-Canadian law concerning foreign currency claims seemed firmly settled. Two propositions were cited as fundamental. The first was that the courts have no authority to enter money judgments in terms of a "foreign" currency—that is a currency other than that of the forum. The second is that in converting from a foreign currency to the currency of the forum the court should have regard to the exchange rate that prevailed on the date of breach—the date the loss was suffered by the plaintiff or when the obligation to him became payable.

There is little in the early English cases from which one can deduce these principles. They were considered recently in the House of Lords and Lord Wilberforce observed that:[1]

> objections based on authority against making an order in specie for the payment or delivery of foreign money, are not, on examination, found to rest on any solid principle . . . Your Lordships were referred to a number of early cases dealing with claims expressed, or which the courts thought should or could have been expressed, in terms of foreign money, but though the examination of them proved interesting . . . I do not think they showed more than that English law up to the 17th century, as one would expect in the state of monetary theory and practice, took an empirical position, allowing claims to be made and enforced in various forms and showing a good deal of flexibility, or blurring, in the forms of action, debt, detinet, debt in the detinet, debt and detinet, being among the forms admitted . . . The most respectful adherent to tradition and legal history can find nothing decisive here.

This body of law is, therefore, of relatively recent creation.

The first of the "modern" cases is *Manners* v. *Pearson*,[2] an 1898 decision of the English Court of Appeal. At issue was a series of sums due under a contract and payable periodically in Mexican currency. The plaintiff claimed an account of the amount due. Although divided on the conversion date, the court was unanimous as to the currency in which judgment must be given. Lindley, M.R., with whom Rigby L.J. concurred, put it thus:[3]

> Before considering the questions raised by this appeal it is necessary to ascertain the grounds on which any judgment or order for payment in English money can be properly made in a case where the plaintiff sues upon a contract to pay in the currency of a foreign country. The terms of the contract confer no right to payment in English money. If the defendants had tendered to their creditor either in Mexico or wherever he demanded payment the amounts due from them in Mexican dollars at the proper times they would have offered to perform their obligations in strict accordance with their contract.
>
> The necessity for considering what amount the defendants ought to pay in English money arises simply from the fact that the plaintiff, having the right to sue the defendants in this country for a breach of their contract, has chosen to sue them here instead of in Mexico; and, speaking generally, the Courts of this country have no jurisdiction to order payment of money except in the currency of this country. Whatever sum is ordered to be paid, whether for principal, interest, or damages, must be expressed in English money, or such order cannot be enforced by the ordinary writs of execution.

The dissenting judge, Vaughan Williams, L.J., agreed, saying:[4]

> It seems clear that, in an action in whatever form in the English courts for the recovery of a debt payable in foreign currency, the amount of the English judgment or order must be expressed in English currency . . .

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[1] *Miliangos* v. *George Frank (Textiles) Ltd* [1976] A.C. 443, 466.
[2] [1898] 1 Ch. 581.
[3] *Ibid.* at 586.
[4] *Ibid.* at 592.

The issue concerning the conversion date was whether the court should look to the date the defendant's total liability was ascertained (the date of the accounting) or the dates the individual sums that comprised the account became due. The narrow point that divided the court was the significance attached to the form in which the action was brought. Does an accounting constitute an exception to a more general date of breach rule? The majority thought it did and held the plaintiff was entitled to conversion as of the date of the accounting.[5] In the course of the plaintiff's argument Lindley, M.R. observed:[6]

> If you had brought an action every month you would have recovered on the principle for which you contend, but you have brought one action for an account, and the judgment is for the balance found due on that account. Why should you be treated as having recovered judgment for each monthly payment?

This remark seems to concede the more general rule[7] that was explained by Vaughan Williams, L.J. in his dissenting judgment. In this view, an agreement to pay foreign currency is analogous to a contract to deliver a commodity. He stated:[8]

> It was not questioned on either side but that the total debt ordered to be paid after taking the account must be expressed in English currency, and that the amount in English currency must be arrived at by taking the real value in English currency of the foreign currency at the place where payable as a purchasable commodity—i.e. in practice, according to the rate of exchange existing at the particular time between the currencies . . . .
>
> It seems plain that this mode of computing the value of foreign currency in English sterling, and thus converting the one currency into the other, is based upon damages for the breach of contract to deliver the commodity bargained for at the appointed time and place, and, if this is so, it follows that the date as of which that value must be ascertained is the date of the breach, and not the date of the judgment.

It is this statement of the rule that was cited with approval when this issue next came before the Court of Appeal in 1920.

In *Di Ferdinando* v. *Simon, Smits and Co.*[9] the defendant had breached a contract for the carriage of goods from England to Italy by converting the goods. The plaintiff was held to be entitled to damages equivalent to the value of the goods in Italy at the time of the breach. An action for this amount, 48,000 lire, was pursued in England and an issue arose as to the proper date of conversion from lire to pounds, the relative value of the lira having declined. The Court of Appeal was in little doubt as to the answer:[10] the date of breach rule governed. The analysis of Vaughan Williams, L.J. in *Manners* v. *Pearson* (set out above) was expressly adopted by Bankes, L.J. and Eve, J.

The issue came before the House of Lords a year later, this time in the context of a tort claim. In *S.S.Celia* v. *S.S. Volturno*[11] the owners of an Italian ship claimed damages from the owners of an English ship for losses arising out of a collision. The losses of the Italian shipowners were measured in lire. The relative decline of the lire again raised an issue as to the appropriate date for their conversion into pounds.

A majority of the House of Lords held that the date of breach rule governed the case and followed *Di Ferdinando*. In this case the date of breach

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[5] The plaintiff had sought conversion as of the date of breach because the relative value of Mexican currency had declined between the breach and the accounting.

[6] *Supra*, n. 2 at 585.

[7] For a contrary view see the comments of Lord Cross in *Miliangos*, *supra*, n. 1 at 495, line B.

[8] *Supra*, n. 2 at 592.

[9] [1920] 3 K.B. 409 (C.A.).

[10] The plaintiff was not called upon to argue. *Ibid.* at 411.

[11] [1921] 2 A.C. 544, hereafter referred to as *The Celia* but sometimes cited as *The Volturno*.

was the date the loss was suffered. Lord Carson dissented, taking the view that the exchange rate should be that in effect at the date of judgment. His analysis foreshadowed developments 50 years later.

The most recent authoritative affirmation of the date of breach rule occurred in 1961 in *Re United Railways of Havana and Regla Warehouses Ltd.*[12] The action was for the payment of a debt expressed in a foreign currency. The early cases were applied and the House of Lords held that the rate of exchange that prevailed on the date the debt became payable should govern the conversion to English pounds.

In summary, the English authorities prior to 1970 were firm in the view that all claims sounding in a foreign currency should be converted to, and expressed in, the currency of the forum. The appropriate time for conversion is the date of breach. This rule was applied in a variety of circumstances in which a money judgment was claimed, including claims based on tort, breach of contract and simple contract debt. The English developments since 1970 are considered in the next chapter.

B. Canada

1. The Common Law Position

The English authorities concerning foreign currency claims have always been treated with respect in the Canadian courts. Once the basic principles had been "settled" by the series of cases that culminated in the *Celia*,[13] the Canadian cases tended to adhere to them.[14] In particular, the date of breach rule was applied twice by the Supreme Court of Canada and the English authorities cited in support.[15]

2. Statute

The rule that a judgment can only be given in the currency of the forum, affirmed in the *Havana Ry.*[16] case, is a creature of common law.[17] In Canada, however, that rule is also said to rest on statute. Section 11 of the *Currency and Exchange Act* (Can.)[18] provides:

> All public accounts throughout Canada shall be kept in the currency of Canada; and any statement as to money or money value in any indictment or legal proceeding shall be stated in the currency of Canada.

It has been said that this provision prohibits the entry of a judgment expressed in a foreign currency.[19]

While no general rule concerning currency conversion has been given the force of law by legislation, there are some particular circumstances in which the conversion date is defined by an enactment. A number of provisions adopt the date of breach rule. Section 163 of the *Bills of Exchange Act*[20] provides:

> Where a bill is drawn out of but payable in Canada, and the sum payable is not expressed in the currency of Canada, the amount shall, in the absence of some

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[12] [1961] A.C. 1007, hereafter referred to as *"Havana Ry."* (*sub nom Tomkinson* v. *First Pennsylvania Banking & Trust Co.*).

[13] *Supra*, n. 11.

[14] A useful review of the Canadian jurisprudence was published in the early 1930's: J.S. Denison, *Fluctuations in Exchange in the Courts*, [1932] 10 Can. B. Rev. 134. Only one "rogue case" is noted. In *Quartier* v. *Farah*, (1921) 49 O.L.R. 186 (Ont. C.A.) it was held that where the plaintiff's claim is for services rendered abroad, conversion from the foreign currency should be as of the date of judgment.

[15] *Custodian* v. *Blucher*, [1927] S.C.R. 420, 427 (unpaid dividends); *Gatineau Power Co.* v. *Crown Life Insurance Co.*, [1945] S.C.R. 655, 658 (debt claim).

[16] *Supra*, n. 12.

[17] *See* the comments of Lord Wilberforce in *Miliangos*, *supra*, n. 1 at 469.

[18] R.S.C. 1970, c. C-39. This provision is discussed in Chapter VI.

[19] *Baumgartner* v. *Carsley Silk Co.*, (1971) 23 D.L.R. (3d) 255 (Que. C.A.).

[20] R.S.C. 1970, c. B-5.

express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

Section 33 of the *Court Order Enforcement Act*[21] is one of the provisions concerning the reciprocal enforcement of judgments. It provides:

> Where a judgment sought to be registered under this Part makes payable money expressed in a currency other than the currency of Canada, the registrar shall determine the equivalent of that sum in the currency of Canada on the basis of the rate of exchange prevailing at the date of the judgment in the original court, as ascertained from any branch of any chartered bank; and the registrar shall certify on the order for registration the sum determined expressed in the currency of Canada; and, on its registration, the judgment shall be a judgment for the sum certified.

The *Family Relations Act*[22] provides for the reciprocal enforcement of maintenance orders. Section 70.4 (8) provides:

> Where an order sought to be confirmed under this section makes payable sums of money expressed in a currency other than the currency of Canada, the confirming court, or, where that court is the Supreme Court, the registrar of that court, shall determine the equivalent of those sums in the currency of Canada on the basis of the rate of exchange prevailing at the date of the provisional order of the court in the reciprocating state, as ascertained from any branch of any chartered bank; and the confirming court or the registrar, as the case may be, shall certify on the order when confirmed the sums so determined expressed in the currency of Canada, and the order when confirmed shall be deemed to be an order for the sums so certified.[23]

It is also interesting to note two Canadian statutes that adopt a different rule concerning exchange dates. Section 2 (6) of the *Carriage by Air Act*[24] (Can.) provides:

> Any sum in francs mentioned in Article 22 of Schedule I shall, for the purposes of any action against a carrier, be converted into Canadian dollars at the rate of exchange prevailing on the date on which the amount of any damage to be paid by the carrier is ascertained by the court.

A similar provision may be found in the *Foreign Aircraft Third Party Damage Act*.[25] These provisions embody the date of judgment rule.

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[21] R.S.B.C. 1979, c. 75.

[22] R.S.B.C. 1979, c. 121.

[23] The two reciprocal enforcement provisions should be read with caution. It must be borne in mind that the date of "judgment" or "order" refers to the proceeding in the foreign jurisdiction which, for B.C. purposes, creates an obligation akin to a specialty debt payable when it is entered. This is characterized as an application of the date of breach rule, as "breach" in this context is the failure to pay the foreign order. It is based on *Scott v. Bevan*, (1831) 2 B. & Ad. 78, 109 E.R. 1073.

[24] R.S.C. 1970, c. C-14.

[25] R.S.C. 1970, c. F-28, Schedule, art. 11 (4).

CHAPTER III RECENT LEGAL DEVELOPMENTS

A. England

In the introductory chapter we referred to a radical change of position that has occurred in England in the past decade with respect to foreign currency claims. The catalyst for this change has undoubtedly been Lord Denning. His judgments in a series of cases in the English Court of Appeal have had a significant effect on moving the law away from the position enunciated in the *Havana Ry.*[1] case by the House of Lords.[2]

The starting point[3] was a maritime arbitration dispute concerning salvage. In *Teh Hu* v. *Nippon Salvage Co.*,[4] a Panamanian ship of Liberian registry was salvaged by a Japanese company. The disbursements of the salvors were in yen and security had been given in U.S. dollars by the owners. The salvage was pursuant to Lloyds Standard form of Salvage Agreement, which provided that the salvors' remuneration should be determined by arbitration in London and fixed in pounds. Otherwise, the proceeding had no connection with England or English currency. Between the time of salvage and the time of the arbitration the pound had been devalued in relation to the yen and the U.S. dollar.

The salvors urged that their remuneration should be increased to adjust for the devaluation. The arbitrators accepted this contention but, on the issue coming before the courts, both the judge at first instance[5] and a majority of the Court of Appeal[6] took an opposite view. Relying principally on the *Celia*[7] and *Havana Ry.*, they held that conversion should be as of the salvage date.

Lord Denning dissented, essentially on the basis that the date of breach rule does not do justice between the parties as the valuation in pounds was a purely fortuitous result of the form of the salvage contract and the devaluaion of the pound was not contemplated by the parties. He held there was an implied term in the salvage contract that would insulate the salvor from the effect of the devaluation.[8]

Lord Denning also made the following observation:[9]

> [T]here are many countries whose courts can give judgment for a sum of money in a foreign currency, including some important maritime countries such as Norway, Germany or Italy . . . . I see no reason why English courts in a salvage suit should not do the same. But even if the courts cannot do it, I think that Lloyd's arbitrators can.

The jurisdiction of arbitrators to make awards in foreign currency was denied by Salmon L.J.:[10]

> Nor, in my view, can an arbitrator make an award in foreign currency except, perhaps, by agreement between the parties . . . . I cannot agree that the arbitrator could have made his award in yen or dollars.

These conflicting views are technically *obiter dicta*, but four years later the issue came squarely before the Court of Appeal.

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[1] [1961] A.C. 1007.

[2] Significantly, Lord Denning, sitting as a law lord, had been a member of the court in *Havana Ry.*

[3] For more detailed examination of the recent case law in this area *see* Riordan, *The Currency of Suit in Actions for Foreign Debts*, (1978) 24 McGill L.J. 422; Lapres, Comment, (1977) 55 Can. B. Rev. 132.

[4] [1970] P. 106.

[5] Brandon J.

[6] Salmon and Karminski L.JJ.

[7] [1921] 2 A.C. 544.

[8] *Supra*, n. 4 at 125.

[9] *Ibid.* at 124-5.

[10] Ibid. at 129, 130.

Jugoslavenska Oceanska Plovidba v. *Castle Investment Co.*[11] concerned the arbitration of a claim for payment arising under a charterparty. A Jugoslavian vessel had been chartered to a Panamanian company with payments to be made in U.S. dollars. The agreement provided for arbitration in London.[12] The arbitrators made an award in U.S. dollars but the charterers did not honour it. The owners sought to enforce the award under the English *Arbitration Act, 1950*.[13] Leave to do so was denied on the basis that the arbitrators had no authority to make such an award and the owners appealed.

The Court of Appeal, which again included Lord Denning, adopted the view on this issue set out in his dissent in *Teh Hu*. It appeared that awards for the payment of foreign currency had been made by City arbitrators for many years and, until *Teh Hu*, this practice had not been called into question.[14] It also was noted that "foreign" arbitration awards, which may be expressed in a non-sterling currency, can be enforced under the *Arbitration Act, 1950* without procedural difficulty.[15]

In characteristic fashion, Lord Denning made a pronouncement that transcended the issues of the particular case:[16]

> The reason why some people have thought that an award by English arbitrators must be in sterling is because they have regarded it as equivalent to a judgment by an English judge, which must be in sterling. But there is this difference. When commercial men are in dispute and go to arbitration, they wish to have the dispute resolved. They want a decision one way or the other. Once given, they abide by it. The losing party pays up. There is rarely any need to call in the sheriff or his officer to enforce the award. So it is perfectly fair, as between them, for the arbitrator to make his award in the currency which is appropriate to their dealings. But when a plaintiff goes to a court of law, it is, as often as not, because the defendant cannot pay or will not pay. The plaintiff wants to get judgment against him, and, if need be, levy execution upon his effects.
>
> This is so much in the mind of the courts that they have rules that they will give judgment only in sterling. That is the one currency which is known to the court and to the sheriffs and their officers. I venture to suggest that this view of the courts should be open for reconsideration. If the money payable under a contract is payable in a foreign currency, it ought to be possible for an English court to order specific performance of it in that foreign currency: and then let the exchange be made into sterling when it comes to be enforced. I know that this is not yet the law. There is high authority against it: *see* [*Havana Ry.*]. But the House of Lords have since then held that specific performance can be ordered of a contract to make a money payment: *see Beswick* v. *Beswick* [1968] A.C. 58. This may point the way to a relaxation of the old rule and enable the courts, in proper circumstances, to order payment into a foreign currency . . . .

The opportunity to pursue this theme arose the following year.

Schorsch Meier G.m.b.H. v. *Hennin*[17] involved the sale of automobile parts by the plaintiff, a German supplier, to the defendant, an English trader. The purchase price had not been paid and the plaintiff sued in England seeking a judgment in deutschmarks (D.M.), the proper currency of payment.

The argument in support of such a judgment rested on two bases. First it was asserted that as a result of England's accession to the European Economic Community the "sue for sterling" rule had been superseded by Article 106 of the Treaty of Rome:

> Each member state undertakes to authorise, *in the currency of the member state in which the creditor or the beneficiary resides*, any payments connected with the movement of goods, services or capital, and any transfers of capital and

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[11] [1974] 1 Q.B. 292.

[12] Unlike the agreement in *Teh Hu*, the contract did not call for an award in sterling.

[13] C. 27, s. 26.

[14] *See* the comments of Roskill L.J., *supra*, n. 11 at 303.

[15] *Ibid.* at 305.

[16] *Ibid.* at 299.

[17] [1975] 1 Q.B. 416.

earnings, to the extent that the movement of goods, services, capital and persons between member states has been liberalised pursuant to this Treaty.

The Court of Appeal was unanimous in regarding this as justifying the entry of a judgment in the currency of West Germa..y, which was also an E.E.C. member.

The second argument was that the reasons underlying the "sue for sterling" rule had ceased to exist and the courts were at liberty to disregard it. This argument was also adopted by Lord Denning, with whom Foster J. agreed. He stated:[18]

> Why have we in England insisted on a judgment in sterling and nothing else? It is, I think, because of our faith in sterling. It was a stable currency which had no equal. Things are different now. Sterling floats in the wind. It changes like a weathercock with every gust that blows. So do other currencies. This change compels us to think again about our rules. I ask myself: Why do we say that an English court can only pronounce judgment in sterling? Lord Reid thought that it was "primarily procedural" *see* [*Havana Ry.*]. I think so too. It arises from the form in which we used to give judgment for money. From time immemorial the courts of common law used to give judgment in these words: "It is adjudged that the plaintiff *do recover* against the defendant £X" in sterling. On getting such a judgment the plaintiff could at once issue out a writ of execution for £X. If it was not in sterling, the sheriff would not be able to execute it. It was therefore essential that the judgment should be for a sum of money in sterling, for otherwise it could not be enforced.
>
> There was no other judgment available to a plaintiff who wanted payment. It was no good his going to a Chancery Court. He could not ask the Lord Chancellor or the Master of Rolls for an order for specific performance. He could not ask for an order that the defendant do pay the sum due in the foreign currency. For the Chancery Court would never make an order for specific performance of a contract to pay money . . . .
>
> Those reasons for the rule have now ceased to exist. In the first place, the form of judgment has been altered. In 1966 the common law words "do recover" were dropped. They were replaced by a simple order that the defendant "do" the specified act. A judgment for money now simply says that: "It is [this day] adjudged that the defendant do pay the plaintiff" the sum specified . . . . That form can be used quite appropriately for a sum in foreign currency as for a sum in sterling. It is perfectly legitimate to order the defendant to pay the German debt in Deutschmarks. He can satisfy the judgment by paying the Deutschmarks: or, if he prefers, he can satisfy it by paying the equivalent sum in sterling, that is, the equivalent at the time of payment.
>
> In the second place, it is now open to a court to order specific performance of a contract to pay money. In *Beswick* v. *Beswick*, [1966] Ch. 538; [1968] A.C. 58, this court and the House of Lords held that specific performance could be ordered of a contract to pay money, not only to the other party, but also to a third party. Since that decision, I am of the opinion that an English court has power, not only to order specific performance of a contract to pay in sterling, but also of a contract to pay in dollars or Deutschmarks or any other currency.
>
> Seeing that the reasons no longer exist, we are at liberty to discard the rule itself. Cessante ratione legis cessat ipsa lex.

Lawton L.J., while obviously sympathetic to Lord Denning's view, felt he was bound by *Havana Ry.* and rested his decision solely on Article 106 of the Treaty of Rome.

The issue arose again, almost immediately, in *Miliangos* v. *George Frank (Textile) Ltd.*[19] The facts were similar to those in *Schorsch Meier* but with one critical difference. The plaintiff was a Swiss resident claiming payment in Swiss francs. As Switzerland was not a member of the E.E.C. the Treaty of Rome had no application and the plaintiff's claim rested on the new common law position forged by the majority in *Schorsch Meier*.

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[18] *Ibid.* at 424-5.

[19] [1975] 1 Q.B. 487 (Q.B. and C.A.); [1976] A.C. 443 (H.L.).

At trial, Bristow J. held that the *Schorsch Meier* decision had been given *per incuriam* and declined to follow it.[20] In the Court of Appeal (which again included Lord Denning) this decision was reversed[21] and the case was appealed to the House of Lords.

A majority of the House of Lords agreed with the outcome but not the means by which it was achieved. It was held that Lord Denning erred in applying the maxim *cessante ratione legis cessat ipsa lex*[22] to avoid the binding effect of *Havana Ry.* The scope and application of the maxim was discussed at length by Lord Simon.[23] Although he dissented on the main issue all the Law Lords agreed with him on this point. He asserted that the maxim cannot be invoked by a lower court to disregard an otherwise binding precedent. In any event the developments identified, the decision in *Beswick* v. *Beswick*[24] and the alteration in the formal language of money judgments, were an insufficient basis for a change in the law. As to the latter he observed:[25]

> [T]his seems to me to be a miniscule hair indeed to wag the tail to wag the dog which lay in the kennel your Lordships' predecessors built in the *Havana* case.

Notwithstanding their depreciation of the approach taken in the Court of Appeal, the result was sustained by a majority of the House of Lords, who thought it a proper case in which to apply the 1966 practice statement[26] under which the House might "depart from a previous decision when it appears right to do so."

A number of factors weighed heavily in reaching this conclusion. First, the reasons for judgment in *Havana Ry.* were examined in detail. What emerged was that the "sue for sterling" "date of breach" rules were recognized as having unsatisfactory aspects in *Havana Ry.*, but the practical and procedural difficulties that were thought to flow from any alternative rule militated against change. On a fresh consideraton in *Miliangos* it was concluded that those difficulties were not as formidable as they appeared in 1961. The courts had in fact evolved procedures for dealing with foreign currency claims that seemed to be working satisfactorily.

Second, in 1961 the pound and many other currencies were "fixed" and stable in value and changes in value between the date of breach and the date of judgment or payment were comparatively rare. By 1976 most currencies were "floating" and relative values often changed from day to day. The number of cases in which the choice of a conversion rule would significantly affect the result had greatly increased.

Third, commercial practice had adapted to the realities of currency fluctuations. In particular, arbitrators were now prepared to make foreign currency awards. Lord Wilberforce stated:[27]

> [I]t would be an intolerable situation if a different rule were to prevail as regards arbitrations upon debts expressed in foreign currency on the one hand and actions upon similar debts on the other. Counsel for the appellants was therefore obliged to argue that if he was to succeed the decision in the *Jugoslavenska* case must either be overruled, or narrowly confined. I can find no limits within which it can be confined which would not still enclose the present case, so, if the appeal were to be allowed, the case would have to be overruled. But if I am faced with the alternative of forcing commercial circles to fall in with a legal doctrine which has nothing but precedent to commend it or altering the doctrine so as to conform with

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[20] [1975] 1 Q.B. 491.
[21] [1975] 1 Q.B. 499.
[22] "The reason of the law ceasing, the law itself also ceases." *See* the final line of the quote at note 18.
[23] [1976] A.C. 443, 471.
[24] [1968] A.C. 58. *See* quote at note 18.
[25] *Supra*, n. 23 at 476.
[26] [1966] 1 W.L.R. 1234.
[27] *Supra*, n. 23 at 464.

> what commercial experience has worked out, I know where my choice lies. The law should be responsive as well as, at times, enunciatory, and good doctrine can seldom be divorced from sound practice.

A similar observation was made by Lord Cross.[28]

Finally, what was perceived as the injustice flowing from a rigid application of the date of breach rule was said to justify change:[29]

> I do not for myself think it doubtful that, in a case such as the present, justice demands that the creditor should not suffer from fluctuations in the value of sterling. His contract has nothing to do with sterling: he has bargained for his own currency and only his own currency. The substance of the debtor's obligations depends upon the proper law of the contract (here Swiss law), and though English law (lex fori) prevails as regards procedural matters, it must surely be wrong in principle to allow procedure to affect, detrimentally, the substance of the creditor's rights. Courts are bound by their own procedural law and must obey it, if imperative, though to do so may seem unjust. But if means exist for giving effect to the substance of a foreign obligation, conformably with the rules of private international law, procedure should not unnecessarily stand in the way.

A strong dissent was entered by Lord Simon. In his view a decision to abrogate the date of breach rule was "not one which judges are qualified to take"[30] and the matter would be better left to legislation; nor would such a departure necessarily "be more conducive to general justice."[31] He suggested that this course would "create a number of undesirable anomalies."[32] Some of the concerns raised by Lord Simon are discussed in a subsequent chapter of this Report.

The specific claim in issue in *Miliangos* was a debt sounding in a foreign currency. Lord Wilberforce was careful to limit his decision to such claims:[33]

> I would make it clear that, for myself, I would confine my approval at the present time of a change in the breach-date rule to claims such as those with which we are here concerned, i.e., to foreign money obligations, sc. obligations of a money character to pay foreign currency arising under a contract whose proper law is that of a foreign country and where the money of account and payment is that of that country, or possibly of some other country but not of the United Kingdom.
> I do not think that we are called upon, or would be entitled in this case, to review the whole field of the law regarding foreign currency obligations: that is not the method by which changes in the law by judicial decision are made. In my opinion it should be open for future discussion whether the rule applying to money obligations, which can be a simple rule, should apply as regards claims for damages for breach of contract or for tort.

The position of the other members of the majority on this point is less clear,[34] and the issue remained open.

The availability of foreign currency judgments, and the principles to be applied in claims based on tort and breach of contract, came before the House of Lords in 1978 in two cases heard consecutively by the same court: *Owners of M.V. Eleftherotria* v. *Owners of M.V. Despina R* [*The Despina R*] and *Services Europe Atlantique Sud (SEAS) of Paris* v. *Stockholms Rederiaktiebolag Svea of Stockholm* [*The Folias*][35].

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[28] *Ibid.* at 497.

[29] *Ibid.* at 465 *per* Lord Wilberforce.

[30] *Ibid.* at 490. His comments were set out in greater length in Chapter IV of the Working Paper which preceded this Report.

[31] *Ibid.*

[32] *Ibid.*

[33] *Ibid.* at 467.

[34] Riordan, *supra*, n. 3 at 432, asserts, "the other three majority judges do *not* expressly support such a condition and, on a fair reading of their opinions, they could be seen to be leaning the other way."

[35] [1979] A.C. 685, hereafter referred to as *"The Despina R"* and *"The Folias"*. *See* Bowles and Whelan, *Judgments in Foreign Currencies: Extension of the Miliangos Rule*, (1979) 42 Mod. L. Rev. 452, for a discussion of the cases.

The Despina R was a tort case in which damages were claimed arising out of a marine collision. The claimants' loss related to payments made in several currencies for repairs:[36]

> After the collision *Eleftherotria* was taken to Shanghai where temporary repairs were carried out. She then went to Yokohama for permanent repairs, but it turned out that these could not be carried out for some time. She was therefore ordered to Los Angeles, California, U.S.A., for permanent repairs. Expenses were incurred under various headings (particularized in the judgment of Brandon J. [1978] Q.B. 396, 399) in foreign currencies, namely, renmimbi yuan ("R.M.B."), Japanese yen, U.S. dollars, and as to a small amount in sterling. The owners of the ship are a Liberian company with head office in Piraeus (Greece). She was managed by managing agents with their principal place of business in the State of New York, U.S.A. The bank account used for all payments in and out on behalf of the respondents in respect of the ship was a U.S. dollar account in New York so all the expenses incurred in the foreign currencies other than U.S. dollars were met by transferring U.S. dollars from this account. The expenses incurred in U.S. dollars were met directly by payment in that currency from New York.

The issues to be resolved were set out as follows:[37]

> (a) whether, where the plaintiffs have suffered damage or sustained loss in a currency other than sterling, they are entitled to recover damages in respect of such damage or loss expressed in such other currency, (b) if, in such a case, the plaintiffs are only entitled to recover damages expressed in sterling, at what date the conversion into sterling should be made. Under question (a) there are two alternatives. The first is to take the currency in which the expense or loss was immediately sustained. This I shall call "the expenditure currency." The second is to take the currency in which the loss was effectively felt or borne by the plaintiff, having regard to the currency in which he generally operates or with which he has the closest connection—this I shall call "the plaintiff's currency." These two solutions have to be considered side by side with the third possible solution, namely, the sterling solution, taken at the date when the loss occurred (applying *The Volturno* [*Celia*]) or at some other date.

The court,[38] applying *Miliangos*, had little difficulty in concluding that judgment could be entered in a currency other than sterling.

The more interesting issue was identifying which of the foreign currencies involved was appropriate for judgment the currencies in which the plaintiff's expenses were incurred and in which repairs were paid for, or the so-called "plaintiff's currency." It was held judgment should be in the "plaintiff's currency":[39]

> My Lords, in my opinion, this question can be solved by applying the normal principles, which govern the assessment of damages in cases of tort (I shall deal with contract cases in the second appeal). These are the principles of restitutio in integrum and that of the reasonable foreseeability of the damage sustained. It appears to me that a plaintiff, who normally conducts his business through a particular currency, and who, when other currencies are immediately involved, uses his own currency to obtain those currencies, can reasonably say that the loss he sustains is to be measured not by the immediate currencies in which the loss first emerges but by the amount of his own currency, which in the normal course of operation, he uses to obtain those currencies. This is the currency in which his loss is felt, and is the currency which it is reasonably foreseeable he will have to spend.

Lord Wilberforce went on to qualify this view and elaborate on what is meant by "plaintiff's currency":[40]

> I wish to make it clear that I would not approve of a hard and fast rule that in all cases where a plaintiff suffers a loss or damage in a foreign currency the right

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[36] *Ibid.* at 695.

[37] *Ibid.* at 696.

[38] The principal judgment was delivered by Lord Wilberforce, with whom Lords Diplock, Salmon and Keith agreed. Lord Russell delivered an assent speech.

[39] *Supra*, n. 35 at 697.

[40] *Ibid.* at 698.

currency to take for the purpose of his claim is "the plaintiff's currency." I should refer to the definition I have used of this expression and emphasise that it does not suggest the use of a personal currency attached, like nationality, to a plaintiff, but a currency which he is able to show is that in which he normally conducts trading operations. Use of this currency for assessment of damage may and probably will be appropriate in cases of international commerce. But even in that field, and still more outside it, cases may arise in which a plaintiff will not be able to show that in the normal course of events he would use, and be expected to use, the currency, or one of several currencies, in which he normally conducts his operations (the burden being on him to show this) and consequently the conclusion will be that the loss is felt in the currency in which it immediately arose.

The Folias was also a shipping case, but one in which damages were claimed arising out of a breach of contract:[41]

> This case arises out of a charterparty under which the appellants chartered the *Folias* to the respondents for a round voyage from the Mediterranean to the East Coast, South America. The hire was expressed to be payable in U.S. dollars, but there was a provision that in any general average adjustment disbursements in foreign currencies were to be exchanged in a European convertible currency or in sterling or in dollars (U.S.). The appellants are Swedish shipowners, the respondents are a French company which operates shipping services. The proper law of the contract was English law.
>
> In July 1971 the respondents shipped a cargo of onions at Valencia (Spain) for carriage to Brazilian ports. They issued bills of lading in their own name. There was a failure of the vessel's refrigeration as a result of which the cargo was found to be damaged on discharge. The cargo receivers claimed against the respondents and, with the concurrence of the appellants as to quantum, this claim was settled in August 1972 by a payment in Brazilian currency of cruzeiros 456,250. In addition, the respondents incurred legal and other expenses.
>
> The respondents discharged the receivers' claim by purchasing the necessary amount of cruzeiros with French francs.

The respondent charterers' claim related to the payment made to the cargo receivers and was framed as one for damages on the basis that the charterers had incurred a personal liability under the bills of lading that they were compelled to discharge.

The charterers' right to a judgment or award in a non-sterling currency was not seriously questioned and, again, the principal issue involved identifying which foreign currency was appropriate to satisfy their claim. Here there was a wide range of choice:

- sterling—the currency of the proper law of the contract and of the forum, and an alternate currency for general average adjustments;
- cruzieros—the currency used by the charterers to discharge the cargo receivers' claim;
- French francs—the currency used to purchase the cruzieros, and the "national" currency of the claimants;
- U.S. dollars—the currency of account and payment under the charterparty, and an alternative currency for general average adjustments.

The House of Lords again appealed to the principle of *restitutio in integrum* and held that "the plaintiff should be compensated for the expense or loss in the currency which most truly expresses his loss,"[42] adopting the words of Lord Denning, who had considered *The Folias* in the Court of Appeal.[43] The arbitrators who had originally heard the claim held this to be French francs and their view was sustained.

In summary, *Miliangos*, *The Despina R* and *The Folias* form a trilogy that has swept away most of the preceding law on foreign currency claims and

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[41] *Ibid.* at 699.
[42] *Ibid.* at 701.
[43] [1979] Q.B. 491, 514.

overruled a number of cases that had been faithfully followed in the Canadian courts. We now turn to the impact these decisions have had in Canada.

B. Canada

1. Currency and Exchange Act, Section 11

One immediate effect of the recent English cases has been a fresh look at section 11 of the *Currency and Exchange Act*.[44] As we indicated in the last chapter, this section provides that "any statement as to money or money value in any indictment or legal proceeding shall be stated in the Currency of Canada," and this is widely regarded as prohibiting foreign currency judgments.

In his comment on *Miliangos* and the cases that led to it, Brian Riordan has raised the question whether section 11 is *intra vires*.[45] His views, and additional arguments which cast doubt on the efficacy of section 11 in prohibiting foreign currency judgments, will be outlined in a subsequent chapter.

2. The Courts

The English decisions also seem to have awakened the interest of litigants in Canada and a number of them have tested the Canadian law in the light of these developments.

In *Batavia Times Publishing Co.* v. *Davis*[46] the plaintiff sued in Ontario on a judgment rendered in the state of Pennsylvania in U.S. dollars. The possibility of entering an Ontario judgment in U.S. dollars was not seriously considered in the light of section 11 of the *Currency and Exchange Act* but much attention was devoted to the issue of the proper date for conversion from U.S. to Canadian currency. The choice was between the date judgment was given in Pennsylvania (date of breach) and the date of judgment in the Ontario court (date of judgment).

Carruthers, J. approached the issue from the point of view that actions on judgments form a special category of proceeding that, for the purposes of currency conversion, do not necessarily follow the rules applicable to other money claims. He asserted:[47]

> The English Courts in cases involving an action brought to enforce a foreign judgment appear to have dealt with a choice of conversion date on a basis different than where the action was proceeding on the original cause of action, and where the Court was required to assess damages or give judgment in terms of or on the basis of foreign currency.

He then noted the paucity of Canadian authority on currency conversion in proceedings on foreign judgment and considered the two leading English cases on the matter.[48] Both cases adopted the date of breach rule and both were decided before *Miliangos*. Carruthers, J. then considered *Miliangos* at length and the shadow it cast on the authority of those cases.

He then turned to the two Supreme Court of Canada cases in which the date of currency conversion was in issue. Although both adopted the date of breach rule in general terms, because they did not involve foreign judgments he regarded them as not binding:[49]

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[44] R.S.C. 1970, c. C-39.

[45] Riordan, *supra*, n. 3 at 438.

[46] (1978) 7 C.P.C. 105, 20 O.R. 437.

[47] *Ibid.* at 107.

[48] *Scott* v. *Bevan*, (1831) 2 B. & Ad. 78, 109 E.R. 1073; *East India Trading Co.* v. *Carmel Exporters & Importers Ltd.*, [1952] 2 Q.B. 439.

[49] *Supra*, n. 46 at 113-14.

> The decision of the House of Lords in *Miliangos* has reversed the English cases, and in particular the rule of law upon which the Canadian cases, including those of the Supreme Court of Canada to which I have referred, have proceeded. Although strictly speaking the *Miliangos* has not overruled those decisions of the Supreme Court of Canada including the decision of the Judicial Committee of the Privy Council in *The Celia* v. *The Volturno*, supra, and they therefore remain today as authorities binding upon the lower Courts of Canada, I find it difficult to accept that those cases should now be applied by the lower Courts. Apart from the fact that the "breach-day" rule which they applied no longer exists in England, when I consider that justice requires that a creditor should not suffer by reason of a depreciation of the value of currency between the due date on which the debtor should have met his obligation and the date when the creditor was eventually able to obtain judgment . . .

He concluded:[50]

> In my opinion the decisions of the Supreme Court of Canada in *The Custodian* v. *Blucher* and in *Gatineau Power* v. *Crown Life* and the decision of the Judicial Committee of the Privy Council in *The Celia* v. *The Volturno* cannot be applied in cases involving the enforcement of a foreign judgment so as to require me to follow that which was done in *Scott* v. *Bevan* and *East India Trading Co.* I hold this view without considering that those cases would not now in my opinion likely be followed in England.
>
> As I find the situation in Canada at this time, then, there are no authorities which bind me in determining the conversion date in a case such as we are dealing with here. I am then in my opinion free to adopt that date which in my view "avoids an injustice" and is "in step with commercial needs." Neither of the parties should be adversely affected by flunctuating currencies.

He then proceeded to adopt the date of his judgment as the appropriate date for currency conversion.

In reaching this conclusion Carruthers, J. was obviously influenced by the injustice that he felt would flow from the application of the date of breach rule and by the reasoning of the House of Lords in *Miliangos*. Whether he was justified in reaching that conclusion is another matter. His assertion that the English courts have dealt with a proceeding on a judgment (for currency conversion purposes) on a basis different than a proceeding on an original cause of action is not supported by the authorities and the way the Supreme Court of Canada decisions are distinguished is not totally convincing.

Whatever the technical defects of *Batavia Times*, it has been warmly received in the British Columbia courts. Divergent views, however, have emerged as to its scope. A narrow interpretation of *Batavia* has emerged in several cases, but within this scope (action on a foreign judgment) it has been applied.

Schacht v. *Schacht*[51] involved the enforcement, in British Columbia, of a judgment rendered in the State of California. Gould, J. held:

> One small difficulty remains. . . . [s. 11 of the *Currency and Exchange Act.*] . . . The plaintiff's California judgment will need to be converted into Canadian funds and a rate of exchange applied. The question of the appropriate date of exchange has been dealt with many times. The traditional answer was an application of the "breach day rule" enunciated in [*Havana Ry*]. More recent, roller-coaster exchange rates, resulting from our now floating dollar have rendered this rule unfair in application to a plaintiff kept out of his money. *Batavia Times Publishing Company* v. *Davis* held that a new and fairer rule should apply for actions to enforce foreign judgments. This new rule does not run afoul of Supreme Court of Canada precedent (see Batavia case . . .). The new rule calls for conversion to take place at the rate of exchange prevailing on the date of the domestic judgment. This allows the Court to set a figure in Canadian dollars

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[50] *Ibid.* at 115.

[51] S.C.B.C. Vancouver Registry No. 32795/74, March 30, 1981. Abstracted in (1981) 8 A.C.W.S. (2d) 426 (No. 0826); *rev'd.* on other grounds, (1982) 37 B.C.L.R. 344 (B.C.C.A.)

> which, while perhaps less just than using the date of actual payment, is a fair middle ground . . . . The conversion rate will be that prevailing on this day, March 30, 1981.

In *Am-Pac Forest Products Inc.* v. *Phoenix Doors Ltd.*[52] the plaintiff supplied materials[53] to the Canadian defendant. Payment was to be made in U.S. funds. Kirke Smith J., on whom a wider reading of *Batavia* had been urged, stated:[54]

> . . . for at least 1½ centuries the English courts, in cases involving an original cause of action, as opposed to an action to enforce a foreign judgment, chose as governing the relevent time for conversion the so-called "breach-day" rule, i.e., the date of the original breach, whether the action lay in contract or tort. Authoritative decisions have followed and enshrined this principle: see *The Custodian*, v. *Blucher* . . . and *Gatineau Power Co.* v. *Crown Life Ins. Co.* . . . . Recently, in England, an opportunity arose for reconsideration of the matter in light of the realities of modern economic conditions; and in [*Miliangos*], the House of Lords opted for the date of payment of the debt, rather than the date of breach, as the most appropriate for currency conversion. English law, therefore, now conforms to commercial realities; and in this country a step in the same healthy direction has since been taken in *Batavia Times Publishing Co.* v. *Davis* . . . where Carruthers, J. in a very thoughtful judgment reviewed the previous English and Canadian authorities and concluded that he could, in that case, order that conversion should take place as of the date of his judgment in the action.

He expressed agreement with a statement by Carruthers, J. in *Batavia Times* concerning the unhappy state of the Canadian authorities but then stated:[55]

> I echo this cri du coeur, but I have concluded that in the factual situation confronting me I have no option but to apply those authorities. If this were a case seeking enforcement of a foreign judgment, I should gladly follow the path of Carruthers, J.; but in an action on the original cause of action I have, as I conceive it, no freedom to do so. I must, in view of the Supreme Court of Canada decisions I have mentioned, follow the "breach-day" rule and order conversion as of 12th July 1977.

Am-Pac has been applied in two subsequent cases. In *C.I.B.C.* v. *Singh*[56] the decision of Esson, J. on this point is succinct:

> The law in this province is that, in cases involving an original cause of action as opposed to an action to enforce a foreign judgment, the time for conversion is the date of the original breach. *Am-Pac Forest Products Inc.* v. *Phoenix Doors Ltd. and William Arab.*

In *Sedam* v. *Whitehead*[57] the plaintiff's claim was for damages under the *Family Compensation Act*[58] for wrongful death and it was held that pecuniary loss was suffered in U.S. dollars.[59] The issue arose as to the proper date for conversion to Canadian currency. Trainor, J. considered the recent cases. He first quoted the remarks of Kirke-Smith, J. in *Am-Pac*[60] and continued:

> Kirke-Smith, J., although eager to follow the path struck in *Batavia*, where enforcement of a foreign judgment was sought, concluded that he was obliged to apply the authorities he cited and follow the 'breach-day' rule . . . . Especially where contracts provide for payment in a foreign currency, it may be that commercial realities demand that fluctuations in the rate of exchange be regarded as a relevant factor in determining quantum of damages. However, that

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[52] (1979) 14 B.C.L.R. 63 (B.C.S.C).

[53] A commodity colourfully referred to as "doorskins."

[54] *Supra*, n. 52 at 66.

[55] *Ibid.* at 67.

[56] Unreported, Supreme Court of British Columbia, Vancouver Registry No. C775814, supplementary reasons for judgment June 3, 1980.

[57] S.C.B.C. Vancouver Registry No. C791517, Jan. 2, 1981. Abstracted in [1981] B.C.D. Civ. 2058-01.

[58] R.S.B.C. 1979, c. 120.

[59] The reasons for this are not disclosed in the decision.

[60] The passage quoted *supra* at n. 54.

> argument is less persuasive in an action for damages for tort. In any event, the authorities require that I conclude that the appropriate date on which to effect the conversion is the date of death.

Batavia was given a wider reading in *Williams & Glyn's Bank Ltd.* v. *Belkin Packaging Ltd.*,[61] decided six months after *Am-Pac*. There the plaintiff sued on a series of promissory notes payable in England in sterling. McKenzie, J. held that the defendant was liable upon the notes and, with respect to currency conversion, stated:[62]

> The breach-day rule prevailed in England for over 300 years, but in the present decade the rule has been cast out on the basis that the economic and legal conditions underlying the application of the rule no longer exist and, therefore, the law has been changed to conform to existing commercial realities and the date of judgment or payment substituted.
> Before the change was affected in England, the Supreme Court of Canada had followed the English practice and applied the breach-day rule. That court has not had occasion to consider the question since the change in England but Carruthers, J.of the Ontario High Court of Justice did so in 1978 in *Batavia Times Publishing Co.* v. *Davis* . . . .
> I am wholly in agreement with the reasons for judgment given by Carruthers J. including the justifications he made for not following the Supreme Court of Canada decisions.

In the result, he felt justified in converting sterling to Canadian funds at the rate in effect at the date of judgment.

This judgment cannot be reconciled with *Am-Pac*, which does not appear to have been cited to McKenzie, J. In adopting a date of judgment rule, rather than following *Am-Pac*, it goes significantly beyond the decision in *Batavia Times* and no justification for that extension is given.

Williams & Glyn's Bank v. *Belkin Packaging Ltd.* was appealed to the British Columbia Court of Appeal[63] but these proceedings failed to provide an authoritative answer to the conflict with *Am-Pac*. The appeal was based on both the issue of liability on the notes and the currency conversion aspect. A majority of the Court of Appeal reversed the trial decision on the issue of liability and made no reference to the currency issue.

The dissenting judge, Hutcheon, J.A., agreed with the trial decision as to liability but not on the currency issue. He endorsed the approach taken by Kirke-Smith, J. in *Am-Pac* and concluded that the date of breach rule applied.[64]

A further appeal was taken to the Supreme Court of Canada. The decision of the majority of the Court of Appeal was affirmed and, again, the decision was silent on the currency issue. The penultimate sentence of the judgment reads:[65]

> It is therefore not necessary, in my view of the appropriate disposition of this appeal, to consider the issues arising with reference to the appropriate conversion date from pounds sterling to Canadian dollars.

Thus the conflict in the British Columbia decisions remains unresolved.

The *Batavia* case has also received further consideration in Ontario. In *Clinton* v. *Ford*,[66] the plaintiff sued on a South African judgment stated in S.A. rand. The endorsement on the writ of summons claimed a judgment at the exchange rate prevailing at the date of its issue. The statement of claim which followed claimed at the higher rate of exchange prevailing on the date it

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[61] (1980) 18 B.C.L.R. 279, 15 C.P.C. 209.
[62] *Ibid.* at 280.
[63] (1981) 28 B.C.L.R. 96.
[64] *Ibid.* at 115, 116.
[65] (1983) 21 Bus. L.R. 282, 305 (S.C.C.).
[66] (1982) 37 O.R. 448.

was drawn. The plaintiff sought summary judgment which was granted on the higher exchange rate (date of the statement of claim). No materials were before the chambers judge as to the rate of exchange prevailing at the time the matter was heard. This judgment was sustained by the Ontario Court of Appeal. Houlden, J.A. first quoted, with apparent approval, the observations in *Batavia* that the judge should be free to adopt a date which avoids an injustice and is in step with commercial needs. He concluded that:[67]

> While Judge Sullivan might have used the rate of exchange prevailing on the date of judgment, I am unable to say that, on the material before him, he erred in using the rate prevailing at the date of the statement of claim.

The exchange rate issue has been considered in other procedural contexts as well.[68]

An extension of *Batavia* has also been urged in Ontario in an action not involving a foreign judgment but merely a debt payable in a foreign currency. In *Airtemp Corp.* v. *Chrysler Airtemp Canada Ltd.*[69] the plaintiff sued on a series of debts payable in U.S. dollars. His claim had been set out on a specially endorsed writ which a Master had given leave to amend converting the U.S. funds to Canadian currency at the rate of exchange in effect on the date the writ was issued.

The Master's order was appealed to Montgomery, J., who noted the recent developments in England and quoted extensively from the decision of Carruthers, J. in *Batavia Times*. He declined to follow the Supreme Court of Canada decisions affirming the date of breach rule and concluded:[70]

> In my view the economic exigencies of galloping inflation and interest rates demand a modern approach. The most compelling conversion date must be the most recent reasonable date. I am, therefore, of the view that the date of issuance of the writ is the appropriate date for conversion of American to Canadian currency.

A further appeal was taken to the Divisional Court, who allowed the pleading to stand but noted that[71]

> It remains open to the defendant to raise in an affidavit of merits or in a subsequent stage of these proceedings, as it may be advised, the interesting questions as to the appropriate conversion date of the foreign currency in which the debt is expressed and the appropriate rate of interest claimed in the writ.
>
> It is in our view neither necessary nor appropriate for the Court to make a decision on those substantitive questions at this stage of the proceedings and in the context of an application of this nature. We do not interpret the decision of the Master or of Montgomery, J. as precluding the defendant from raising these matters by way of defence and those decisions are not determinative of those issues. The decision of this Court is confined to the issue whether the Master properly held the special endorsement, as it will be amended, to conform to Rule 33 and in our opinion there is no basis for interfering with his decision in this respect.

Hence a third conversion date has received a limited endorsement with respect to actions other than those on judgments.

In summary, the recent Canadian cases seem to demonstrate considerable dissatisfaction among the judiciary with the date of breach rule and, in some cases, they have been willing to depart from it. The results, however, have been confusing and contradictory and have ranged from a reluctant adherence to the date of breach rule, through the endorsement of conversion as of the date of the writ or statement of claim, to taking the date of judgment as appropriate for currency conversion.

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[67] *Ibid.* at 454.

[68] *Minister of State of the Principality of Monaco* v. *Project Planning Associates*, (1980) 32 O.R. 438 (Div. Ct.), 9 A.C.W.S. 245 (Ont. C.A.). *Gross* v. *Marvel Office Furniture Mfg. Ltd.*, (1979) 9 C.P.C. 103 (Ont. S.C.); *National Westminster Bank* v. *Burston*, (1980) 16 C.P.C. 27, 28 O.R. 701 (Ont. S.C.). *Bedford* v. *Shaw*, (1981) 33 O.R. 766

[69] (1980) 11 Bus. L.R. 47 (Ont. S.C.)

[70] *Ibid.* at 51.

[71] (1981) 31 O.L.R. (2d) 481, 485-6.

CHAPTER IV THE DATE OF BREACH RULE RECONSIDERED

A. Introduction

The uneven reaction of the Canadian courts to *Miliangos*[1] leaves considerable doubt as to the current status of the date of breach rule in British Columbia. The difficulty arises out of a failure, in those cases that have departed from the rule, to confront directly the older Supreme Court of Canada decisions in which the rule was adopted. Rather, they have taken the form of questionable extensions of the *Batavia Times*[2] case, itself a decision that is not wholly supportable.

For the purposes of the balance of this Report, we proceed on the basis that the date of breach rule continues to be the general rule applicable in cases where currency conversion is necessary. Whether it should continue to be the rule is, of course, the central issue with which we are concerned.

B. Arguments for Abandonment of the Rule

1. The Rule is Based on an Inappropriate Analogy with Commodity Contracts

A thread that runs through the English currency cases from *Manners* v. *Pearson* to *Havana Ry.*[3] is that a monetary obligation sounding in a foreign currency is analogous to a contract to deliver a commodity and that similar principles should apply to measure the obligee's recovery if the bargain is not kept.

A commodity example may clarify the issue.

> On January 1, A purchased from B one ton of dried beans for $500, the market price on that date, but B has failed to deliver them. A sues B and recovers judgment on December 1 but in the meantime the price of beans has risen to $800 per ton. A will recover judgment for $500, the price of the beans on the date of the breach, rather than their value at the date of judgment.

The rationale that underlies this result is that as soon as the breach occurred A could have gone into the market and purchased his beans for $500 from another supplier and so mitigated the results of the breach. The subsequent rise in price is either too remote to affect the size of his claim or is simply irrelevant.[4]

In a commodity context this is a defensible result, but what if A's claim was for Swiss francs payable on January 1 for goods that A had supplied to B (the *Miliangos* situation)? How does A protect his interest in such a case? The commodity approach suggests that A should go into the market and buy Swiss francs; but what is the point of such an exercise? Lord Wilberforce seems to suggest that this is an exercise in futility:[5]

> [I]n the case of the inevitable contract to supply a foreign cow, the intending purchaser has to be treated as going into the market to buy one as at the date of breach, this doctrine cannot be applied to a foreign money obligation, for the intending creditor has nothing to buy his own currency with—except his own currency.

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[1] [1976] A.C. 443.

[2] (1978) 7 C.P.C. 105.

[3] [1898] 1 Ch. 581; [1961] A.C. 1007.

[4] It has recently been suggested that, even at common law, the date of breach rule need not invariably be applied in such cases. *See Johnson* v. *Agnew*, [1979] 2 W.L.R. 487, 499 per Lord Wilberforce (H.L.). *See also Cormier Enterprises Ltd.* v. *Costello*, (1980) 108 D.L.R., (3d) 472 (N.B. App. Div.). Moreover, this principle is not strictly applied in equity where damages may be awarded in lieu of specific performance. *See Wroth* v. *Tyler*, [1974] Ch. 30, and the discussion in Waddams, *infra*, n. 11 at 436.

[5] *Supra*, n. 1 at 468.

Waddams does not find this reasoning wholly convincing:[6]

> An answer appears to be that many cases can be envisaged where the creditor does treat money like a commodity and can and does protect himself against fluctuations in value. One example is where the creditor is a currency dealer who makes a purely speculative contract, paying $1,000 for a promise to deliver 10,000 marks on a future date. On the due date the debtor defaults, the exchange rate is M10 = $1, and the creditor purchases 10,000 marks on that date, spending $1,000. If the mark subsequently appreciates to M5 = $1 the creditor is surely adequately compensated if he recovers $1,000 plus interest at Canadian rates. He would be overcompensated (most would say) if he recovered $2,000. Another example is the multi-national corporation with active bank accounts in both currencies. A case can be supposed where, on the debtor's default, the creditor promptly transfers money from its dollar account to its mark account. Again in such a case compensation in dollars (plus interest) seems adequate. Even in the case of an individual foreign creditor protection against currency fluctuation is by no means so complex as Lord Wilberforce suggests. All that is necessary (transposing the example to that of dollars and marks) is for the creditor to borrow $1,000 and to buy 10,000 marks. A subsequent decline in the dollar will not affect him, and a judgment for $1,000 plus interest at Canadian rates will fully compensate, enabling him to repay the loan and the interest on it. If the creditor actually does this it would seem that a judgment for $2,000 would overcompensate. If this is so it must, on general principles of mitigation be overcompensatory if the creditor had the opportunity of protecting himself but failed unreasonably to take advantage of it.

This analysis raises the question whether the burden of taking steps to guard against an adverse fluctuation in the currency of the forum should be on the innocent plaintiff. Arguably it should fall on the defendant—the party in breach.

2. The Rule Can Lead to Unfair Results

It is often argued that a rigid application of the rule can lead to unfair results. The English cases leading up to *Miliangos*, and those which follow it, all arise out of cases in which a judgment in the currency of the forum converted as of the date of breach are said to be unfair to the innocent plaintiff.

It is necessary to define what is meant by "fairness" in this context. The standard against which the fairness of a result may generally be tested is summed up in the Latin phrase *restitutio in integrum*: the plaintiff should, as far as possible, be put in the same position he would have been in had the breach not occurred. The clearest case is where the currency of the forum has undergone a relative decline. A rule which requires that a properly founded claim for payment in a foreign currency may be discharged by payment of depreciated currency may fall significantly short of the standard described above.

The situation where the value of the "plaintiff's currency" has undergone a relative decline raises more difficult problems. In some cases the plaintiff may be placed in a better position by the application of the date of breach rule. This, arguably, is unfair to the defendant, although one is less sympathetic to his plight because he is the party in breach. In other cases, the defendant's delay or failure in paying may have prevented the plaintiff from mitigating the consequences of the decline in his currency and the date of breach rule may come closer to restoring his position than any alternative.

It cannot, therefore, be asserted that the date of breach rule consistently or invariably produces an unfair result. One can go no further than to observe

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[6] Waddams, "Commentary on Foreign Money Liabilities," (1981-82) 6 Can. Bus. L.J. 352, 361.

that in a wide variety of situations, perhaps a majority of cases, the application of the date of breach rule does not yield a result that achieves *restitutio in integrum*.

3. Academic Comment and Criticism

Academic lawyers who have considered the rules relating to currency conversion have been almost unanimous in their condemnation of the rigid application of the date of breach rule. Those writing before *Miliangos* called for reform and those writing later have welcomed the new developments.

The most trenchant commentator over the years has been Dr. F.A. Mann in successive editions of his book, *The Legal Aspect of Money*. His pre-*Miliangos* views are worth setting out at some length:[7]

> The preceding exposition of the English law as it at present stands [1953] has been deliberately freed from any discussion of the relevant rules. It now becomes necessary to embark upon a comprehensive survey of the question whether or not they are sound. It is perhaps convenient to state at the outset the conclusion to which the following pages will lead: the transformation of foreign money obligations through the institution of legal proceedings in this country is unfortunate; the root of the evil lies in the rule of English law of procedure that judgment cannot be pronounced by an English court otherwise than in pounds sterling; as long as this rule exists, many, though not all, evils would be remedied by the application of the judgment-date rule, the breach-date rule being particularly inadequate.
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> 1. Many of the doubts surrounding the justification of the existing English rules are impressively elucidated by three decisions of foreign courts. . . .
>
> [Mann then discusses the three cases and continues]
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> 2. These cases exemplify the difficulties created by the fact that a foreign money obligation is converted into the *moneta fori*. They suggest that there is only one solution which is in every respect satisfactory: judgment ought to be given in terms of the foreign money of account; the amount of the judgment should be converted into sterling at the rate prevailing at the date of payment, whether it is made voluntarily or as a result of execution. The result could be achieved by adding a few simple provisions to the Rules of Supreme Court.
> It is accepted that, by virtue of the nominalistic principle, such changes in the international value of money as occur before the day of breach are immaterial. By virtue of the same principle changes occurring after the day of breach or wrong should be immaterial. . . . No rule other than that suggested above will give effect to this principle. If sterling depreciates after the date of breach or wrong, this would not prejudice the creditor of a judgment expressed in that foreign money which is *in obligatione*. If, on the other hand, the foreign money of account depreciates, the suggested rule would preclude the creditor from making a profit by instituting proceedings in England, for according to the nominalistic principle he must bear the risk arising from any fall in the foreign money of account. Under the proper law of the obligation he may, it is true, have a claim for damages for non-payment at the due date, but this is a distinct cause of action which should not surreptitiously be adjudicated upon by *lex fori*.
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> 3. The breach-date rule has been based on four grounds, none of which is convincing.
> The first is taken from the general law of damages, namely from the "principle of ensuring to the injured party, as far as possible, the full measure of compensation to which he is entitled." But this ground holds good only in case the stability of the English currency is presupposed. It fails when sterling depreciates, because in that event the creditor receives less than he is entitled to. It also fails when the foreign money of account depreciates, because in this case the creditor receives more than he is most probably entitled to under the law governing the obligation. In other words, the truth is that the breach-date rule allows either more or less than "the full measure of compensation." These points have so often been emphasized in these pages and are

[7] F.A. Mann, The Legal Aspect of Money, 325 (2d ed., 1953). The three cases discussed are: *I P Rspr.* 1930, No. 50 (15 May 1930) (Germany); *Matter of James*, 248 N.Y. 1, 161 N.E. 201 (1928); *The Vaughan and Telegraph*, 14 Wall (81 U.S.) 258 (1872). *See also* Nussbaum, Money in the Law, National and International, 370 (1950).

indeed so obvious that they do not require to be further elaborated or exemplified. A second line of argument is derived from the "true function and purpose of the judgment." It is said that the measure of damage is the loss sustained at the time of breach or wrong and that consequently the plaintiff must receive such a sum as represents the market value of the loss at that time. That this argument is beside the point has already been indicated by Lord Carson. It relates to the determination of the money of account and of the quantum of the obligation, but it has nothing to do with the question of conversion. At the stage when this question is reached, the loss suffered by the plaintiff is both expressed and measured in a certain currency. The function of the English court is not to evaluate or measure the loss, but to translate the evaluated loss into terms of pounds sterling. Moreover, that argument is taken from the general rules relating to the measure of damages in England. But whether or no it provides, in that connection, a satisfactory rationale, it is not for English law *qua lex fori* to encroach upon the extent of the obligation by increasing or reducing it. If the contract does not provide for payment in England (in which event different considerations apply), the jurisdiction of English courts is usually fortuitous and cannot justify the introduction of English ideas into the substance of the obligation.

The third reason propounded in favour of the breach-date rule is that any other date would cause the amount ultimately awarded to depend on the accidents and the fortuitous character of legal proceedings and would encourage exchange speculations. Or, as Lord Wright said, "to adopt the date of payment would be to place the rate of exchange in the control of the debtor who could, at his will or convenience, delay payment and thus benefit, or attempt to benefit, by the fluctuations of exchange." This argument, like the first, is based on the unfounded assumption that sterling never depreciates. And, like the first, it is equally unjustified, if the foreign money of account depreciates: it is for the proper law, not for the *lex fori* to say whether the creditor is entitled to damages for delay. Furthermore, it is open to the creditor to take steps with a view to preventing delay.

As regards actions in debt in particular, it is often said that it is highly desirable that the same rule should prevail as in actions for damages. Everybody will agree with this proposition. But if it appears that the rule applying to actions for damages is unsound, some would have preferred to sacrifice uniformity in order to arrive at a better principle with regard at least to actions in debt.

It thus becomes evident that the breach-date rule is ill founded. The alternative, i.e. the judgment-date rule, likewise has many disadvantages. It does not, it is true, involve an arbitrary revalorization of the claim in respect of any depreciation of the foreign money of account occurring before the date of judgment, nor does it prejudice the plaintiff if the pound sterling currency depreciates between the date of breach and the date of judgment. But it is unable to prevent arbitrary results arising from fluctuations of monetary value between the date of judgment and the date of payment. This is particularly so where, owing to appeals or other circumstances, there elapses a considerable period before the judgment is satisfied. Nevertheless, in the majority of cases such disadvantages will not be felt, since payment will generally be made soon felt, since payment will generally be made soon after the judgment is rendered. On the whole, therefore, the judgment-date rule appears to be preferable.

That it does not afford the ideal solution has been explained above. The only ideal solution is that which in strict adherence to the nominalistic principle gives to the plaintiff the exact sum of foreign money to which he is entitled irrespective of its international valuation at the time of payment, and leaves it to the law governing the obligation whether or not damages for non-payment can be claimed in order to compensate the plaintiff for the intermittent depreciation. To attempt to solve the latter question by fixing a date with reference to which a conversion must be effected is both wrong in theory and abortive in practice.

These passages were written prior to the decision in *Miliangos*. Similar criticism and a call for reform may be found in the 1972 edition of *McGregor on Damages*.[8] It seems evident that such comment carried great weight in *Miliangos*.

The *Miliangos* result was, not surprisingly, welcomed by Mann. In the most recent edition of his book, (1982) he described it as "a remarkable piece of judicial legislation," and continued:[9]

[8] Thirteenth edition, 1972.

[9] F.A. Mann, The Legal Aspect of Money, 347 (4th ed.,1982).

> It has resulted in a pattern which allows the law to be stated in a few simple sentences and produces throughout wholly satisfactory solutions so as to leave no room for academic discussion.

The English developments have also stirred the interest of Canadian academics. With only one exception they have urged a reconsideration of the date of breach rule by both the courts and legislators. An example is Riordan's comment:[10]

> As was the case in England before *Miliangos*, courts in Canada will generally convert the foreign sum into Canadian dollars at the rate of exchange prevailing at the time the debt came due. In the beginning, they cited English case law to justify this practice, since there was no legislative guideline as to which date to choose. There is still no legislation on this point and, as a result, the Canadian "breach date" rule is based on a series of Canadian cases which adopted a now obsolete British rule. A strong argument could be made for Canadian judges to permit themselves to be swayed by the same logic which has recently prevailed in English courts. Even admitting that section 11 of the *Currency and Exchange Act* regulates the matter with respect to currency of suit, Canadian judges still have final say as to when to convert foreign sums into dollars. It is time they re-examined the "breach date" rule in light of the issues considered in *Miliangos* and *Schorsch Meier*.

A reconsideration of the rigid application of the date of breach rule has also been urged by Professor Waddams[11] and Professor Castel.[12]

The only Canadian academic to have expressed reservations about the desirability of change is Professor Fridman. After discussing *Miliangos* he states:[13]

> It may be argued that, since: (1) this depended upon the peculiar conditions of England, and English currency; (2) it was founded upon the willingness of the House of Lords to reverse its earlier opinion; (3) it also depended upon the view their Lordships took of the maxim *cessante ratione cessa ipsa lex, i.e.*, as justifying an exception to a general rule in appropriate cases, not an overthrow of settled legal doctrine simply because of altered social, economic or other conditions; and (4) Canadian courts are not necessarily now bound by decisions in England, even of the House of Lords; therefore, a Canadian court is free to choose whether to adhere to the so-called "breach-date" rule, and the proposition that damages are payable only in the currency of the forum, or whether to accept the newer English rule at a time when inflation is rampant and vast differences could result in the calculation of damages at any time. In this respect, it must be stated that the reasoning and language of Lord Simon of Glaisdale are both very persuasive: and the issue is by no means as straightforward as a reading of the speeches of the majority would lead one to believe at first sight.

While there is substantial agreement among academic lawyers on the desirability of abandoning the rigid application of the date of breach rule, there is less uniformity of opinion as to what legal position should be adopted as an alternative.

4. The Date of Breach Principle is Inconsistently Applied

As with most rules of general application, certain exceptions exist (either clearly or arguably) in which the date of breach rule respecting currency conversion is ousted in favour of some alternative formulation.

(a) Accounting

Manners v. *Pearson*[14] was discussed in Chapter II. The majority decision is authority for the proposition that where the plaintiff frames his claim as one

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[10] Riordan, *Currency of Suit in Actions for Foreign Debts*, (1978) 24 McGill L.J. 422, 440.

[11] Waddams, The Law of Contracts, 439 (1977).

[12] Castel, Canadian Conflict of Laws, Vol. 1 at 531 and Vol. 2 at 573 (1975, 1976). *See also, Note: The Inflation Factor in Damages for Breach of Contract*, (1980) 12 Ottawa L. Rev. 489, 497.

[13] Fridman, The Law of Contract in Canada, 582 (1976).

[14] *Supra*, n. 3.

for an accounting, with judgment for the sum found due, the conversion date is the date the account was taken. The current status of this exception is uncertain. Mann, writing in 1953, observed that "the dissenting judgment . . . has since so often been quoted with approval that it may be doubtful whether the view taken by the majority would find favour with the House of Lords."[15]

An accounting may also take place in the context of a proceeding to enforce a mortgage. Here the exception seems more clearly established. Mann asserts that:[16]

> The date for the conversion of foreign money to which mortgages of reversionary interests in a fund are entitled on the distribution of the fund is the date of the Master's certificate, not the date the fund falls in by the death of the tenant for life.

The mortgage accounting exception is also supported by Ontario authority. The headnote to *Cortes* v. *Lipton Building Ltd.* states:[17]

> In a mortgage action, including a claim on the covenant which calls for payment in U.S. funds, the mortgagee is entitled to be so paid at the rate of exchange for Canadian dollars at the time when payment is made. Hence, in referring the matter to the Master the proper direction is to have him determine the amount due in U.S. funds as of the date of the Master's report and to convert such amount into Canadian funds at the rate of exchange prevailing at the date of the report, and also to have him determine in the same manner on the date of the report the amount to be paid for redemption on a date to be fixed by the Master in accordance with R. 495 (Ont).

A contrary result, however, emerged in *Johnson* v. *Pratt*,[18] a Manitoba case.

(b) Foreign Judgments

Where a plaintiff seeks to enforce a foreign judgment in a Canadian court a strict application of the date of breach rule would call for currency conversion as of the date of accrual of the cause of action on which the foreign judgment was founded. This, however, has never been the law. It has long been the rule that conversion takes place as of the date of the foreign judgment. More recently it has been held both in Ontario and British Columbia that the date of the enforcing judgment should be adopted.[19] These cases were discussed in the previous chapter.

(c) Disbursements in Legal Proceedings

It has recently been held in the Federal Court of Canada that where a disbursement that has been made in a foreign currency is claimed as costs the appropriate conversion date is that on which the costs are taxed and not the date the disbursement is made.[20]

(d) Arbitrations

In England, the power of an arbitrator to make an award for the payment of foreign currency is now well established. This was discussed in the previous chapter in connection with the *Jugoslavenska*[21] case. So far as we are aware the issue of whether Canadian arbitrators have a corresponding power has not been tested. Arguably the terms of section 11 of the *Currency and Exchange Act*[22] ("indictment or legal proceeding") are not wide enough to

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[15] Mann, The Legal Aspect of Money, 323 (2d ed.).

[16] *Ibid.* citing *In re Chesterman's Trust*, [1923] 2 Ch. 466 (C.A.).

[17] (1965) 47 D.L.R. (2d) 489 (Ont. H.C.); *affd.* (without written reasons) [1965] 2 O.R. 282. *See also Morrell* v. *Ward*, (1863) 20 Gr. 231.

[18] [1934] 1 W.W.R. 321 (Man. K.B.).

[19] *Batavia Times*, *supra*, n. 2; *Schacht* v. *Schacht*, (1981) A.C.W.S. (2d) 426 (No. 0826).

[20] *Dillingham Corp.* v. *The Shinyu Maru*, (1979) 101 D.L.R. (3d) 447 (Fed. Ct. Trial Div.).

[21] [1974] 1 Q.B. 292 (C.A.).

[22] R.S.C. 1970, c. C-39.

encompass arbitration proceedings, and Canadian arbitrators do have such a power.

(e) Claims for Services Rendered Abroad

In *Quartier* v. *Farah*[23] an Ontario court, in 1921, held that the date of judgment should define the exchange rate when the plaintiff's claim is for services rendered abroad. In a footnote to an earlier chapter we described this as a "rogue case" in the sense that it was out of step with other decisions of its era. It still stands as a precedent that might be followed if similar facts should arise.

(f) Aircraft Conventions

In Chapter II we pointed out that the *Carriage by Air Act*[24] and the *Foreign Aircraft Third Party Damage Act*[25] both adopt a date of judgment rule for foreign currency conversion.

(g) Proof of Claims in Insolvency Proceedings

It had long been thought that where a foreign currency claim was proved in bankruptcy the usual date of breach rule applied.[26] In a recent Quebec case,[27] however, involving a proposal by an insolvent it was held that conversion to Canadian money should be as at the date of the proposal.

Canadian bankruptcy legislation is likely to undergo a significant change in the near future. Several "exposure" bills embodying a new *Bankruptcy Act* have been introduced into the Parliament of Canada in the past few years. A common feature of the more recent versions of those bills has been the following provision:[28]

> A claim for a debt that is payable in a currency other than Canadian currency shall be converted to Canadian currency
>
> (a) in the case of a proposed arrangement, if a notice of intention was filed under section 101, as of the day the notice was filed or, if no notice of intention was filed, as of the day the proposed arrangement was filed with the administrator; or
>
> (b) in the case of a bankruptcy, as of the date of bankruptcy.

This section places currency conversion on a basis that is roughly analogous to a "date of writ" rule.

(h) Conclusion

It cannot be said that the exceptions to the date of breach rule are so numerous or pervasive that the inconsistency they introduce into the law is intolerable and *per se* leads to a conclusion that reform is desirable. The exceptions do, however, demonstrate that it is not an immutable rule of public policy which possesses intrinsic merit. The elimination of some exceptions would, however, be a useful consequence of reform if an acceptable rule can be developed.

5. The Work of the English Law Commission

The subject of this Report has also been canvassed in a Working Paper published by the English Law Commission entitled Private International Law:

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[23] (1921) 49 O.L.R. 186 (Ont. C.A.)

[24] R.S.C. 1970, c. C-14, s. 2 (6)

[25] R.S.C. 1970, c. F-28, Sched. Art. 11 (4)

[26] *See* Houlden and Morawetz, Bankruptcy Law of Canada, 190 (1960); 2 C.E.D. Ontario, Title 15, s. 413; *Re McKay*, (1922) 52 O.L.R. 466 (Ont. H.C.)

[27] *Re Can. Vinyl Indust. Inc.: Textilwerke Gebruder Hoan* v. *Corber*, (1978) 29 C.B.R. 12, 79 D.R.S. para 2-754 (Que. Sup. Ct.)

[28] Bill S-14, s. 317 (2) (1979); Bill S-11, s. 313 (2) (1978). In England it has been held (post-*Miliangos*) that in a voluntary liquidation, the appropriate date for currency conversion is the date of the commencement of the winding up. *See*, *In re Lines Bros. Ltd.*, [1982] 2 W.L.R. 1010 (C.A.).

Foreign Money Liabilities.[29] This subject was added to their programme in 1972, well before *Miliangos*, by a reference in the following terms:[30]

> To advise on the problems which may arise if a sum of money is due in a currency other than that of the place of payment or the place where payment is sought.

As events unfolded, their approach to that mandate necessarily shifted:[31]

> The task of dealing with our terms of reference against this background has therefore confronted . . . [us] with something like a moving staircase of judicial development, and it was necessary to judge when this had reached a stage at which a general review of our law in this field appeared to be appropriate. We think that this stage has now been reached, for two main reasons. First, the broad repercussions of *Miliangos* have now been worked out by the courts and there appears to be something of a lull in further development, although this impression can of course be overtaken at any time by new decisions. Secondly, there still remain issues which require consideration, both as the result of *Miliangos* and independently. Such issues may well fall to be dealt with by our courts after the publication of this Working Paper, and in relation to them its contents may be of assistance.

The bulk of the Law Commission's Working Paper was therefore devoted to an explanation of the implications of the new, judge-made law in a number of areas. We believe it is important at this point to note a significant feature of the Working Paper, the approach by the Law Commission to the changes wrought by *Miliangos*:[32]

> The first question for consideration must be whether the abrogation by *Miliangos* of the sterling-breach-date rule and the adoption of a new rule—namely, that in an appropriate case the court may give judgment in the form that the defendant "do pay [say] 1,000 U.S. dollars or their sterling equivalent at the time of payment"—is to be welcomed in principle. Although we are not aware that this change is causing difficulties (indeed, we believe that it has generally been strongly welcomed), we have nevertheless thought it right in the interests of completeness to consider this question. To answer it requires examination of the substantive principle which underlies the change.
>
> The thrust for the abandonment of the former rule originated in judicial dissatisfaction with the injustice suffered by a plaintiff due to the sterling-breach-date rule in the case where, at the date of judgment, the value of sterling as against that of the foreign currency in question was lower than at the date when the obligation had become due. This occurred, for example, after a devaluation of sterling or through the operation of floating exchange rates . . . .
>
> The effect of a judgment in the form indicated in *Miliangos* is to ensure that the value of the defendant's foreign money liability is measured in terms of the foreign currency in question. Accordingly the principle underlying the adoption of that form of judgment goes further, in two respects, than simply to obviate the injustice to the creditor caused by a fall in the relative value of sterling between the date when the obligation became due and the date of judgment. In the first place, it prevents a corresponding injustice to a debtor in the converse case—that is to say, where the relative value of sterling has risen after the due date . . . .
>
> The second respect in which *Miliangos* goes further than is necessary only to protect the plaintiff against a fall in the relative value of sterling between the date on which the obligation became due and the date of judgment is by ensuring that the value of such obligation remains constant after judgment. When judgment is given (say) for "1,000 U.S. dollars or their sterling equivalent at the date of payment" neither a rise nor a fall in the relative value of sterling after judgment will affect the real value of the sum (whether expressed in dollars or in sterling) which is needed to satisfy the judgment debt: if the debtor chooses to pay in sterling, he will have to find such sterling sum as is equivalent to 1,000 U.S. dollars on the date when he satisfies the judgment.
>
> It is our view that the principle which underlies Miliangos and the consequences which flow from it produce a result which both in theory and in practice is greatly to be preferred to that produced by the sterling-breach-date rule.

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[29] Working Paper No. 80 (1981).

[30] *Ibid.* at 1.

[31] *Ibid.* at 3.

[32] *Ibid.* at 65–68.

C. Arguments for Retention of the Date of Breach Rule

1. Introduction

In the Working Paper that preceded this Report, we stated that "it is difficult today to find an articulate advocate for the date of breach rule."[33] In the result, in discussing the arguments in favour of the rule, we focused almost exclusively on the dissenting speech of Lord Simon in *Miliangos*.

The date of breach rule no longer lacks a champion. The void has been filled by Roger A. Bowles and Christopher J. Whelan, two English academics. They responded to the Working Paper with one of the most thorough and thought provoking submissions which this Commission has ever received, setting out cogent arguments in favour of the retention of the rule.

The Bowles-Whelan submission was a lengthy and detailed one. It is difficult to summarize fairly within the confines of this Report without courting the danger of unintentional distortion or misplaced emphasis. Fortunately, an abbreviated version of the submission was published in the *Canadian Bar Review*[34] and is available to the reader who wishes to pursue the arguments in greater depth.

Below, we set out what we perceive to be the main threads of the Bowles-Whelan submission. Following that will be a discussion of certain concerns raised by Lord Simon in his dissenting speech in *Miliangos*.

2. The Bowles-Whelan Arguments

We see two principal aspects to the arguments put forward by Bowles and Whelan for the retention of the breach date rule. They are, to a degree, interrelated. First, they assert that the "advantages" of the Miliangos approach have been overstated by its proponents. Second, they suggest that the Miliangos approach leads to uncertainty in the marketplace which has undesirable consequences.

(a) The Overstated Advantages of Miliangos

Bowles and Whelan take issue with those commentators who regard it as self-evident that *Miliangos* represents an improvement over the prior law and achieves fairer results. They assert that these commentators tend to ignore the role of prejudgment interest in compensating the plaintiff. If interest is taken into account the "gap" between the results flowing from the adoption of differing conversion dates is much narrower than it might otherwise appear.[35]

They point to the *Miliangos* litigation itself to establish this point. In the absence of any allowance for interest, the plaintiff in *Miliangos* would have recovered under a date of breach rule only 70% of what was recovered under date of payment rule. It is this figure on which most commentators have focused. If, however, simple interest at the rate appropriate to the currency is taken into account, the recovery under the breach date rule jumps to 81%. If the courts were permitted to award compound interest, the figure would be 84% (the inability of the courts to do so is deplored by Bowles and Whelan). They also observe that these results occurred when the pound was going through an extraordinarily bad time and imply that under normal circumstances the gap would be narrower.

To the extent that some gap might remain, Bowles and Whelan appear to concede that the plaintiff may not be restored to the position he would have been in had the breach not occurred. They argue, however, that in this context

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[33] Law Reform Commission of British Columbia, *Foreign Money Liabilities*, 49 (Working Paper No. 33, 1981).

[34] Bowles and Whelan, Review of Foreign Money Liabilities, Working Paper No. 33, (1982) 60 Can. B. Rev. 805.

[35] The role of prejudgment interest is discussed in greater detail in Chapter V of this Report.

the concept of *restitutio in integrum* acquires a new meaning and that justice is achieved if the plaintiff's recovery accords with his commercial expectations. They suggest that international traders in the position of the plaintiff in *Miliangos* are alive to the possibility of a breach on the part of those with whom they contact and to the possibility that their recovery may be affected by adverse fluctuations in exchange rates. They suggest that this additional risk is reflected in the price they charge for the goods and services they provide.

They also assert that any departure from the breach date rule creates an undesirable potential for uncertainty that outweighs any marginal "injustice" that may flow from the rule.

(b) The Miliangos Approach Creates Uncertainty

A major portion of the Bowles and Whelan submission is devoted to the proposition that the *Miliangos* developments have created a degree of uncertainty which was absent under the prior rule. They point first to the fact that English case law remains unsettled as to when a court will make an award in the plaintiff's currency in preference to sterling. In *The Folias* and *The Despina R* a "flexible rule" was expressly advocated by Lord Wilberforce. The confusion in the *Ozalid* case[36] is cited as an example of the "flexible rule" in action. Even where it is clear that a currency other than sterling is appropriate, the search for the true "plaintiff's currency" may be a difficult one. The *B.P. Exploration*[37] case is cited as an example of this. The result, they assert, is that parties may be forced to litigate claims which under a less flexible rule, such as that provided by the breach date rule, would have been settled at an early stage.

They also suggest that the *Miliangos* developments provide a new incentive to delay. Under the former rule, the liability of the defendant was fixed and there was no incentive to delay other than that present in all litigation. Under the new rule, the extent of liability will depend, in part, on post-breach currency fluctuation and this may, depending on the nature of the fluctuations, provide a new incentive to the plaintiff or an additional incentive to the defendant to delay settlement.

The uncertainty which is said to flow from *Miliangos* is then placed in a broader perspective in an elaborately developed economic argument concerning the importance of certainty in international transactions. They conclude:

> The essence of the economic argument is thus that when parties enter contracts they have a more or less clear idea about how well-off they can expect to be under various contingencies, irrespective of whether the contract is a very detailed one that lists all possible contingencies or a rather vague one leaving many possibilities uncatered for. The parties thus proceed in the knowledge that the court will intervene in the event that their contract breaks down, and will intervene in ways that are readily predictable in the light of how they have intervened previously. To discuss what is in the reasonable contemplation of the parties and restoring the plaintiff to the position he would have been in had the contract not broken down is to make assertions about the prior beliefs held by the parties about how the courts would react to a contractual breakdown. What is important therefore, is not so much the rule that the court chooses to apply but that the court should apply the same rule consistently through time and across cases.
>
> Accordingly, we submit that the critical and fundamental requirement is that the legal rules be certain. The overwhelming evidence of cases since *Miliangos* is that uncertainty is generated by the new rules. Moreover, there is the highest English judicial support for the proposition that "certainty is of primary importance in all commercial transactions" . . . .

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[36] *Ozalid Group (Export) Ltd.* v. *African Continental Bank Ltd.*, [1979] 2 Lloyds Rep. 231. *See* Chapter V of this Report.

[37] *B.P. Exploration Co. (Lybia) Ltd.* v. *Hunt (No. 2)*, [1978] 1 W.L.R. 783.

> It is primarily the problem of uncertainty which itself generated practical difficulties that we doubt whether the *Miliangos* principle is to be preferred. First, cases have already revealed an undesirable level of uncertainty; secondly, commercial parties at the time of contracting will be able to reach a more equitable bargain in the shadow of a law that is clear and certain; and thirdly, when a dispute occurs, a certain rule should generally prevent the kind of opportunistic behaviour which, as the rules are applied somewhat erratically by the judiciary, currently pertains . . . .
>
> We submit that if certainty is indeed to be regarded as of primary importance in all commercial transactions then the flexibility of the *Miliangos* principle as extended in *The Despina R* and *Folias* cannot be endorsed. We have argued that the rules which have emerged since 1975 are less conducive to general justice than has been widely assumed. Accordingly, we urge a continuation of the rigid and certain rule which exists in British Columbia. This would most closely achieve the twin principles of nominalism and *restitutio in integrum*.
>
> If "justice" is to be regarded as of primary importance, so that *restitutio* is to be achieved in every individual case, then a continuation of the breach-date rule may be rejected. However, we submit that the injustice will not be as great in the individual case as has earlier been thought, while the injustice of a flexible rule to the general commercial community will be such as to justify its objection. A Canadian dollar award *with interest* would be a certain rule which would, within the existing interpretations of nominalism and *restitutio in integrum* provide justice, certainty and consistency

3. Lord Simon's Concerns

Many of the issues raised by Lord Simon in his dissenting speech have since been overtaken by events. For example, in *Miliangos* he expressed concern that the majority decision would create an unacceptable situation in which different conversion rules applied depending on whether the plaintiff's action was based on a debt payable in a foreign currency or a claim for damages based on tort or breach of contract. He also spoke of difficulties that would arise where multiple currencies were involved or where the jurisdiction of the proper law of the contract was different from that of the currency in which the claim is made. All of these concerns have been met and dealt with in subsequent English cases, particularly the decisions of the House of Lords in *The Despina R* and *The Folias* discussed in the preceding chapter. Even before these decisions it had been suggested that Lord Simon's concerns in this regard were misplaced.[38]

Lord Simon also pointed out that the abandonment of the date of breach rule would create anomalies in cases where that rule has been given statutory force.[39] This observation is as true in British Columbia as in England.[40] There seem to be two answers to such a concern. First, we might simply live with the anomaly in the same way we are presently prepared to live with the anomaly that is created by those enactments that embody the date of judgment rule.[41] Second, the inconsistent enactments might be amended if a change in the general law commends itself. This course was adopted in England following *Miliangos*[42].

In Lord Simon's dissent, he also suggested that the abandonment of the date of breach rule would create a number of practical problems:[43]

> . . . [O]verruling the *Havana* case would seem to involve a whole number of procedural problems to which no solution has been propounded which is satisfac-

[38] D.F. Libling, *Questions & Answers (?): Miliangos*, (1977) 93 L.Q. Rev. 212.

[39] *Supra*, n. 1 at 487 (citing an English enactment comparable to s. 163 of the *Bills of Exchange Act*)

[40] *See* Chapter II, section B.2.

[41] *Ibid.*

[42] *See Administration of Justice Act, 1977*, c. 38.

[43] *Supra*, n. 1 at 487.

tory to me at least. How can set-off be worked, under R.S.C., Ord. 18, r. 17? . . . [H]ow can payment into court be worked under Ord. 22, r. 1? What if the payment-in is sufficient to satisfy the debt on the basis of conversion at the date of payment-in, but the foreign currency subsequently appreciates? . . . [W]hat if there is a change in the exchange rate before notice of payment-in is received (Ord. 22, r. 1 (2) or within 21 days of receipt of such notice (Ord. 22, r.3)? . . . Then there is the possible combination of counter-claim and set-off with a payment into court . . .

The procedural issues were analyzed at length by Libling and his comments are worth setting out in full:[44]

> The present writer does not propose to discuss procedural questions in detail, but offers some observations as to the underlying principles. As the issues involved are somewhat disparate, set-off and payment into court are dealt with separately.
>
> A. Set-Off
>
> "A set-off is a monetary cross-claim which is also a defence in the claim made in the action." A set-off gives rise to two problems.
>
> The plaintiff's claim may be based on a different cause of action from the defendant's set-off; the plaintiff may, for example, bring his action in debt for the price of goods sold, whilst the defendant may be claiming damages for breach of contract, alleging that the goods were not in accordance with specification. It has already been submitted that the date of payment rule ought to apply not only to debt but to all contractual claims. If this submission is correct the above aspect of set-off presents no difficulty.
>
> A plaintiff's claim may properly be assessed in a foreign currency whilst the defendant's set-off may properly be assessed in sterling. An illustration may be of assistance:
>
> > P, a United States resident, enters into a contract of sale with D, an English resident. The purchase price is $10,000. P delivers the goods but D pays only $8,400. The goods are defective and D suffers a loss on resale of the goods in England. D's damages are agreed at £500.
>
> At the time of D's failure to pay the full purchase price and at the time of delivery £1 equalled $1.60. At the time of the trial £1 equals $1.00.
>
> If the plaintiff's claim is converted into sterling at the date of payment and only then the def_ndant's set-off is offset, the plaintiff would receive £1,100 in our example. This would be unjust. However, to posit such a result is to misunderstand the nature of a set-off.
>
> A set-off operates as a defence to the claim, unlike a counter-claim, which is a separate action resulting in a separate judgment. In order to quantify the plaintiff's claim the set-off must first be off-set. In our example, the plaintiff's claim is for $1,600 less $800 (£500), *i.e.* the set-off at the time when it arose. Thus the plaintiff is entitled to a judgment of $800 or its sterling equivalent (*i.e. £800*).
>
> *B. Payment Into Court*
>
> Payment into court is an attempt by the defendant to discharge his obligation to the plaintiff by payment. The adequacy of the payment must be assessed at the time the payment is made. This does not introduce "yet another date for conversion." The rule in *Miliangos* provides for conversion at the date of payment; in practice this means the date on which enforcement of the judgment is authorized, but that is only a practical limitation on the courts' ability to effect conversion at the date of payment. An analogy can be drawn with a case of a company in liquidation where conversion takes place at the notional date of discharge of the debt, that is the date on which the winding-up order is made. So with payment into court, if the payment is adequate, conversion of the claim into sterling, it is submitted, takes place on the notional date of discharge of the debt, that is the date of payment into court. To illustrate:
>
> > P brings an action against D in debt. The debt is eventually assessed at U.S. $8,000. D makes a payment into court, at which time £1 equals $1.60. The payment into court is not accepted. At the time of judgment £1 equals $1.

[44] *Supra*, n. 38 at 228. The comments respecting the legal nature of a counterclaim may not be totally accurate with respect to British Columbia where the law is, arguably, somewhat different. This issue was explored in our Report on Guarantees of Consumer Debts (LRC 43, 1979) 106–109 (Appendix B).

Variant I - The payment into court was £5,000.
Variant II- The payment into court was £4,000.

It is submitted that in variant I, P will only receive £5,000 and D will be awarded costs as from the date of payment into court. The adequacy of payment into court must be assessed at the time it is made. As D's payment equalled P's claim, P's claim is notionally discharged by payment at that date.

It is submitted that in variant II, P will obtain judgment for $8,000, *i.e.* £8,000. A person is not obliged to accept a smaller sum in satisfaction of a larger debt. Therefore, there has been no notional payment by D and P's claim continues unabated till judgment. P would also obtain full costs.

Libling's view seems to be that the "problem" is illusory and that the courts, if left to their own devices, should have no difficulty in dealing with cases that raise these issues.

Finally, Lord Simon asserts that the date of breach rule is more likely to yield a just result in cases in which the "plaintiff's currency" has undergone a relative decline and the plaintiff has been prejudiced by the delay in payment. He gives the following example:[45]

> John Mitchell is a newly and greatly enriched dividend-stripper and property speculator in England. He conceives that a notable art collection would be a desirable adjunct and mark of his new position in society. His art agent learns that Count Comnenus has the finest collection in Central Europe, accumulated by his enlightened family over the centuries; and that the estates of the count are so heavily encumbered that he is reluctantly faced with the necessity of selling his family collection. The deal is clinched. John Mitchell agrees to buy the collection for 10 million Ruritanian talers. The taler is gold-backed, and the sum is equivalent to £1 million. The collection is duly shipped to England, but the purchaser fails to pay on the due date. It is not his fault. War has broken out, and strict exchange control has been imposed. Towards the end of the war a revolution takes place in Ruritania. Count Comnenus is glad to escape with his bare life, and arrives penniless in this country. In the meantime, the Ruritanian taler, no longer gold-backed, has become worth only the accumulating paper it is printed on. Count Comnenus remembers his debt from Mr. Mitchell and that his magnificent collection is now the principal ornament of the Mitchell mansions. He claims £1 million. Mr. Mitchell tenders him a lorry filled with 10 million worthless Ruritanian talers. Is it justice that Mr. Mitchell should succeed, the proud possessor of a valuable collection acquired for nothing, and that the count should starve?

Lord Simon seems to suggest that only the application of the date of breach rule can do justice between the parties in these cases. There are a number of answers to this suggestion and in the next chapter we will explore ways of dealing with such cases, which do not involve strict adherence to the date of breach rule.

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[45] *Supra*, n. 1 at 488-9.

CHAPTER V

THE EFFECT OF A DELCINE IN THE PLAINTIFF'S CURRENCY

A. The Issue

The *Miliangos* rule emerged at a time when sterling, the currency of the forum, was declining in value relative to a number of other currencies, including that of the plaintiff in that case. A date of payment rule was seen by the court and proponents of the rule as more closely achieving *restitutio in integrum* and thus arriving at a fairer result.

But attention must also be paid to the converse situation, where the "plaintiff's currency"[1] declines in value, relative to that of the forum, after the date of breach:

EXAMPLE

> D, a resident of Ruritania, owes P 100 Utopian rallods, payable on January 1, 1982. On this date the rallod and the Ruritanian taler are at par. D fails to pay and is sued by P in the Ruritania court. P obtains judgment for 100 Utopian rallods and initiates execution proceedings that ultimately yield 50 Ruritanian talers that are available to P. On that date, however, the currency exchange rate has shifted so that one taler may be exchanged for two rallods; hence the amount realized on the execution is sufficient to purchase enough rallods to satisfy the judgment.

On its face it would appear that P has been severely prejudiced by D's delay. If he were paid 100 rallods on July 1, 1983 he would receive only half the purchasing power he would have received had D fulfilled his part of the bargain promptly. Given a fact pattern such as this, it is tempting to agree with Lord Simon and assert that using the date of breach rule achieves a fairer result.[2]

The difficulty is that the fact that P's currency has declined relative to the currency of the forum does not *per se* lead to a conclusion that P is prejudiced by being compensated in his own currency. Much depends on what changes, if any, have occurred with respect to the real purchasing power of P's currency. Whether P has been prejudiced in this example is not a question that can be answered in the abstract.

The fluctuation in the exchange rate will, in large measure, be paralleled by a corresponding change in the relative purchasing power of the two currencies. For analytical purposes it is helpful to develop a measure of purchasing power that is independent of specific currencies. For present purposes we define a unit of purchasing power as a hypothetical "basket" of basic goods and services (e.g. a kilogram of steel, a litre of wheat, a litre of oil, a tonne-kilometre of transportation, etc.). For the purposes of the example, it is assumed that the correlation between changes in exchange rates and purchasing power is exact and one rallod or one taler would each purchase one basket on January 1, 1982 (the date of breach). On the date of payment all the example tells us is that one taler would purchase two rallods. This represents the following range of possibilities:

(1) The purchasing power of both currencies has increased, but disproportionately:
100 talers will purchase 300 baskets
100 rallods will purchase 150 baskets

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[1] Hereafter we use the term "plaintiff's currency" to identify the currency in which the plaintiff's claim or entitlement to compensation should be measured or is payable.

[2] *See* Chapter IV at n. 45.

(2) The purchasing power of both currencies has declined, but disproportionately:
100 talers will purchase 80 baskets
100 rallods will purchase 40 baskets

(3) The purchasing power of one currency has remained stable but that of the other has declined:
100 talers will purchase 100 baskets
100 rallods will purchase 50 baskets

(4) The purchasing power of one currency has remained stable but that of the other has increased:
100 talers will purchase 200 baskets
100 rallods will purchase 100 baskets

(5) The purchasing power of one currency has increased while that of the other has declined:
100 talers will purchase 150 baskets
100 rallods will purchase 75 baskets

Given this analysis, it appears that neither the date of breach rule nor the date of payment rule, *per se*, yields a "just" result in all cases.

In the Working Paper, we explored a number of ways in which a date of payment rule might be "fine tuned" in these circumstances. These included giving the plaintiff the option of choosing between currency conversion as of the date of breach or of the date of judgment, as suggested by Professor Waddams in his treatise on the law of contract.[3] We considered as well the option of giving the court a discretion with respect to the conversion date.[4] Both a wide and a narrow discretion were discussed. Also considered was the possibility that the courts might permit a plaintiff to assert a claim for compensation arising out of the defendant's delay as a distinct head of damages or cause of action. This possibility will be canvassed below.

The mechanism which we identified as best suited to "fine tune" a date of payment regime was prejudgment interest. In retrospect, we see that, in the Working Paper, we understated the importance of interest in the context of foreign money liabilities. In fact it is central to an understanding of how compensation in this area should work. Any discussion which purports to compare a recovery under one conversion rule with that under a different rule and which fails to take account of interest should be regarded with suspicion.

B. The Role of Interest

In British Columbia the courts have been given the power to order the payment of prejudgment interest. Section 1 (1) of the *Court Order Interest Act* provides:[5]

> **1.** (1) Subject to section 2, a court shall add to a pecuniary judgment an amount of interest calculated on the amount ordered to be paid at a rate the court considers appropriate in the circumstances, but the rate shall not be less than the rate that applies to interest on a judgment under the *Interest Act* (Canada), from the date on which the cause of action arose to the date of the order.

A notable feature of this section is that the interest rate is left to the discretion of the trial court. It is to be "at a rate the court considers appropriate in the

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[3] S.M. Waddams, The Law of Contracts (1977). Similar suggestions are made by Brian Riordan in *The Currency of Suit in Actions for Foreign Debts*, (1978) 24 McGill L.J. 422 at 440 and by Khaled Chebil in *Les Jugements Relatifs aux Creances Libellees en Monnaie Etrangere en Droit Anglais, Francais et Canadien*, (1982) 27 McGill L.J. 299.

[4] Law Reform Commission of British Columbia, Foreign Money Liabilities, 67 (Working Paper No. 33, 1981).

[5] R.S.B.C. 1979, c. 76. This Act is based on recommendations made in our Report on Pre-Judgment Interest (LRC 12, 1973).

circumstances." This discretion is fettered only by the prescribed "floor" of the post-judgment interest rate (5%).

In exercising this discretion the courts have generally selected interest rates that are consistent with nominal interest rates yielded by a conservative investment in the marketplace. In the two past years judicially prescribed rates have generally fluctuated along with the rates paid by financial institutions for money on deposit.

How should a court approach an award of prejudgment interest with respect to a foreign money claim? Currency exchange rates and interest rates are related. They do not fluctuate independently of each other. In their submission to us Bowles and Whelan noted:[6]

> [I]t is observed that an inverse relationship may normally be expected to prevail between exchange rate changes and interest rate differentials. Countries with currencies that are expected to be weak over future months or years have to offer higher interest rates than other countries if they are to attract international funds. Thus it is that countries whose currencies prove in the event to be losing value will generally be characterized by high interest rates and vice versa.
>
> The important implication of the existence of an inverse relation between exchange rate changes and the level of interest rates prevailing in the relevant countries is that the higher interest rates may be expected to offset to some extent adverse movements in exchange rates. Indeed this must be so, for international speculators and investors will place their funds in the most lucrative location, and competition to attract such funds will force central banks to offer interest rates that reflect any pessimism that international investors feel about the likely course of future exchange rates. Investors may of course make incorrect guesses about future exchange rates, but such errors simply mean that interest rate differentials may not fully reflect the changes that actually occur in exchange rates.

Another approach is to view interest as containing two elements. The first is true compensation to the plaintiff for the loss of use of his money and the corresponding benefit to the defendant. It is analogous to rent. If the economy were free of inflation the "rent" element of interest would likely amount to only a 3% to 5% rate of return. The balance of the nominal interest, whether in the marketplace or awarded under the *Court Order Interest Act*, may be identified as preserving the purchasing power of the money loaned or withheld. Whether, owing to the absence of compounding, this is wholly effective is debatable.

Bearing in mind the relationship between interest rates and exchange rates, it is useful to consider the way in which the courts might react if they had the power to order payment in a foreign currency or to convert to Canadian funds as of the date of judgment. Our view is that it is open to a court explicitly to recognize this relationship as relevant to the appropriate rate of prejudgment interest. When exercising its discretion in respect of a foreign currency claim, the court would be free to consider the performance of that currency and interest rates payable in the jurisdiction in which that currency is used as legal tender and to award prejudgment interest accordingly.

EXAMPLE

> P sues D in British Columbia for 1000 Utopian rallods that were payable January 1, 1981. He obtains judgment on January 1, 1983. The evidence establishes that during 1981 and 1982 Utopia suffered a period of inflation during which the purchasing power of the rallod dramatically declined. During that period the average rate of interest paid by Utopian banks on money on deposit was 45%.

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[6] *See also* Bowles and Whelan, Review of Foreign Money Liabilities, Working Paper No. 33, (1982) 60 Can. B. Rev. at 809.

How should a British Columbia court react to such a fact pattern? We suggest that the interest rate that "is appropriate in the circumstances" is not that which would be paid if the facts arose wholly in British Columbia and the obligation were payable in Canadian funds. Rather, the circumstances suggest that a higher rate is called for and prejudgment interest in the 40% to 50% range would be justified. In the result the court could enter a judgment for 1800 to 2000 rallods (or the Canadian equivalent at the date of judgment). That judgment, however, would accrue interest until payment only at the "legal rate" of 5%.

The example above illustrates how a case involving a declining plaintiff's currency might be dealt with. On other facts, a minimal rate of prejudgment interest may be appropriate.

EXAMPLE

> P sues D in British Columbia for 1000 Ruritanian talers that were payable on January 1, 1981. He obtains judgment on January 1, 1983. The evidence establishes that the purchasing power of the taler was stable during 1981 and 1982 and that money on deposit with Ruritanian banks yielded an average rate of 4%.

In this kind of case it would be appropriate to suppress the inflation compensation aspect of prejudgment and compensate only on a "rent" basis. A minimal award of 5% would be justified. To award more would, arguably, overcompensate the plaintiff.[7]

Support for this view is found in the *Miliangos* litigation. Following the decision of the House of Lords on the currency conversion issue, the case was remitted to the trial Judge, Bristow, J., for final disposition.[8] An issue arose as to the basis on which prejudgment interest should be awarded under applicable English legislation.[9] The plaintiff urged that interest be awarded at the prevailing English rates. This would have resulted in a significantly higher award as the English interest rates had been more than twice those payable in Switzerland during the relevant period.[10]

Bristow, J. adopted Swiss rates as appropriate, with the exact rate to be determined on a reference. He stated:[11]

> In my judgment the approach in English law should be: if you opt for a judgment in foreign currency, for better or for worse you commit yourself to whatever rate of interest obtains in the context of that currency.[12]

The English courts are still in the process of working out the relationship of prejudgment interest to foreign money liabilities. This exercise has not been without its pitfalls and in at least one case they appeared to have approached the selection of an interest rate on an erroneous basis.[13] Nonetheless, prejudgment interest appears to provide a fair and flexible means of achieving

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[7] The example set out at the beginning of this chapter may be usefully examined in the light of this analysis. In each of the "possibilities" with respect to the charged conversion rate, the interest payable in Utopia on the rallod will likely bear an inverse relationship to power. In those "possibilities" where the purchasing changes in purchasing power of the rallod has declined, a higher rate of prejudgment interest will tend to restore its purchasing power.

[8] *Miliangos* v. *Geo. Frank (Textiles) Ltd. (No. 2)*, [1976] 3 W.L.R. 477.

[9] *Law Reform (Miscellaneous Provinces) Act, 1934*, c. 41, s. 3 (1).

[10] *See* Bowles and Phillips, *Judgments in Foreign Currencies: An Economist's View*, (1976) 39 Mod. L. Rev. 196, 197.

[11] *Supra*, n. 8 at 479. Bristow J. also indicated that a decision to award any interest depended on whether interest would be recoverable under the proper law of the contract (in this case Swiss law did permit the awarding of such interest). This seems to be the position under private international law, and the implication is that if the proper law of the contract had been different, interest would not have been awarded. In England, however, an award of prejudgment interest is discretionary. Under the British Columbia *Court Order Interest Act*, *supra*, n. 5 an award of interest is mandatory, and whether or not it would be permitted under the proper law of the contract would seem to be irrelevant.

[12] *See* Bowles and Whelan, *The Currency of Suit in Actions for Damages*, (1979) 25 McGill L.J. 236, 239 for an endorsement of this approach.

[13] *Helmsing Schiffahrts GmbH. & Co. v. Malta Drydocks Corp.*, [1977] 2 Lloyd's Rep. 444.

something approaching *restitutio in integrum* within a framework of familiar principles.

The price to be paid for using prejudgment interest as a vehicle for adjusting rights in foreign currency cases is an additional evidentiary burden. The party seeking a departure from the rate of prejudgment interest usually awarded in domestic cases would be obliged to lead evidence on the "performance" of the foreign currency during the relevant period. Such evidence should, however, be readily available and, on the whole, this burden would not be an onerous one.

C. Damages for Delay

Some commentators have looked beyond interest as a way of compensating the plaintiff whose currency has declined between the date of breach and the time of payment. These commentators identify the defendant's delay as the critical element of the loss. They suggest that the plaintiff might assert a claim for compensation arising out of the delay as a distinct head of damages or cause of action where the plaintiff's loss was foreseeable.[14]

There is some support for this view in the reported cases. Arguably in a recent English case, *Ozalid Group (Export) Ltd.* v. *African Continental Bank Ltd.*,[15] damages for delay were awarded, but divergent views have emerged as to the significance of the case. The English Law Commission in its Working Paper took the view the case can be best understood as one in which such damages were awarded.[16] Bowles and Whelan, however, analyze the case differently and, in their submission to us, characterize it as an application of the *Miliangos* principle. More recently, the New Zealand Court of Appeal upheld an award of damages for delay in a currency case.[17]

Whatever the significance of these cases, other factors suggest the courts may exercise restraint in allowing such damage claims. An important qualification in contract cases arises from Mann's analysis.[18] He recognizes the possibility of a claim for damages for non-payment but asserts that this is a distinct cause of action that must arise under the proper law of the obligation and "which should not be surreptitiously adjudicated upon by *lex fori*."[19] Hence, however creative the courts may be with Anglo-Canadian law in establishing a cause of action for delayed payment, the impact of these developments on obligations governed by the law of jurisdictions in which such a rule has not been adopted is questionable.

How far might the courts go in devising such a cause of action in cases governed by British Columbia law? While the principle of *restitutio in integrum* may suggest such a development, there is a factor that militates against it. A claim for damages for delayed payment is essentially a claim for compensation for loss of purchasing power and such claims have been considered in another context. Recent inflation has led litigants in purely domestic cases to assert claims for additional compensation in respect of pre-trial inflation. Such claims have been before both the British Columbia Court of

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[14] *See*, Knott, *Foreign Currency Judgments in Tort: An Illustration of the Wealth-Time Continuum*, (1980) 43 Mod. L. Rev. 18; D.F. Libling, *Questions & Answers(?): Miliangos*, (1977) 93 L.Q. Rev. 212 and Riordan, *supra*, n. 3 at 436.

[15] *Ozalid Group (Export) Ltd.* v. *African Continental Bank*, [1979] 2 Lloyds Rep. 231.

[16] The Law Commission, Private International Law: Foreign Money Liabilities, 104 (Working Paper No. 80, 1981).

[17] *Naylor* v. *N.Z. Co-op Wool Assoc.*, [1981] 1 N.Z.L.R. 361.

[18] F.A. Mann, The Legal Aspect of Money, 325 (2d ed., 1953) at 328.

[19] *Ibid.* at 251. Mann identifies three jurisdictions that recognize such a cause of action: Germany, Austria and Switzerland.

Appeal[20] and the Ontario Court of Appeal.[21] In such cases those claims were rejected despite arguments based on the principle of *restitutio in integrum*. The conclusion reached in our Working Paper was that "while the Supreme Court of Canada may yet reverse the trend evident in these cases, the prospects of the early creation of a new cause of action for delayed payment are not encouraging."[22] One of our correspondents took a less pessimistic view:

> [T]he courts have in recent years recognized that delay should be taken into account in other respects in assessing damages. For example, where a plaintiff reasonably delays buying replacement property or repairing damage, because he is pursuing specific performance or because he has no funds, the courts have assessed damage based on the cost of buying replacement property or doing work at the date of trial (or an intermediate date), rather than at the date of breach.[23]

D. Conclusion

The purpose of this chapter has been to demonstrate that the possibility that the plaintiff's currency may decline in relative value after the date of breach is not a fatal objection to adopting a date of judgment or a date of payment conversion rule. Prejudgment interest, if awarded on a rational basis, will go a long way toward restoring the plaintiff's position and achieving *restitutio in integrum*.

We do not regard the failure of a clear-cut cause of action for damages for delay to emerge as a serious deficiency. It will be a rare case in which such damages would be necessary to achieve a result that could not be achieved through an award of prejudgment interest.

It should also be noted that prejudgment interest also plays an important role if one adheres to the breach date conversion rule where the plaintiff's currency has declined in relative value after the date of breach. Under the breach date rule, the plaintiff's declining currency would be converted at a more favourable rate but it would attract prejudgment interest at the (presumably lower) interest rate applied by the forum to its own currency. Under a date of payment or date of judgment rule, the plaintiff currency would be converted at the less favourable exchange rate but it would attract prejudgment interest at the (higher) rate appropriate to the plaintiff's currency. The end result—the actual purchasing power recovered by the plaintiff—may not be too different whichever rule is applied. This is a point stressed, rightly in our view, by Messrs. Bowles and Whelan.

This view of the role of prejudgment interest does not necessarily lead to a conclusion that a date of payment or a date of judgment conversion rule should be adopted in preference to the date of breach rule. It goes no further than to demonstrate that, in cases where the plaintiff currency has declined, the courts have at their disposal the means to achieve a just result. In the Working Paper we characterized these as the "hard cases." In restrospect, we recognize that this was something of an overstatement. Given the availability of prejudgment interest, and the possibilities for its creative use, these cases need not be hard at all.

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[20] *McCaig* v. *Reys*, (1979) 90 D.L.R. (3d) 13.

[21] *Leitch Transport Ltd.* v. *Neonex Int'l Ltd.*, (1980) 27 O.R. 363. *See also*: Note, (1980) 12 Ottawa L. Rev. 489.

[22] Law Reform Commission of British Columbia; Foreign Money Liabilities, 75 (Working Paper No. 33, 1981).

[23] The cases cited by our correspondent are: *Asamera Oil Corp.* v. *Baud Corp. N.V.*, (1978) 89 D.L.R. (3d) 1 (S.C.C.); *Schweickardt* v. *Thorne*, [1976] 4 W.W.R. 249 (B.C.S.C.); *Dodd Properties (Kent) Ltd.* v. *Canterbury C.C.*, [1980] 1 W.L.R. 433 (C.A.).

CHAPTER VI CONSTITUTIONAL CONSIDERATIONS

A. Introduction

Any consideration of foreign money claims in a Canadian context raises two questions. The first concerns the general distribution of powers under the *Constitution Act, 1867*[1] (formerly titled the *British North America Act.*) Is legislative power with respect to currency conversion a matter reserved exclusively to either the provinces or the federal government and, if so, to which? Is it open to a provincial legislature to specify *any* conversion date rule, be it date of breach, writ, judgment or payment? If one concludes that the provinces do have the power to prescribe a conversion rule, the second question arises. What is the status of section 11 of the *Currency and Exchange Act*[2] and does it effectively preclude the adoption of a date of payment rule in provincial legislation if such an innovation was thought desirable.

B. General

A starting point for the first question is the *Constitution Act, 1867* itself. The distribution of legislative authority is governed by sections 91 (federal authority) and 92 (provincial authority). It has been observed that:[3]

> The *B.N.A. Act* contains overwhelming internal evidence of the conviction that money, banking and credit (in its public aspect) should be exclusively of federal concern. Among the enumerated classes of subjects in s. 91 are (1) currency and coinage (head 14); (2) banking, incorporation of banks and issue of paper money (head 15); (3) savings banks (head 16); (4) bills of exchange and promissory notes (head 18); (5) interest (head 19); and (6) legal tender (head 20); these are in addition to federal power in relation to bankruptcy and insolvency (head 21).

Of particular relevance is the power with respect to currency.

The provinces, however, have their own array of powers including "property and civil rights in the province"[4] and "the administration of justice . . . procedure in civil matters."[5] The possibilities for conflict are obvious and it is not difficult to envisage areas over which both the Parliament of Canada and a provincial legislature might assert exclusive authority, each claiming under a power reserved exclusively to it and seeking to uphold its own enactment or impugn an enactment of the other. Much of Canadian constitutional law is concerned with resolving conflicts of this kind.

It now seems well established that legislation enacted by one branch of government may touch on subject matter reserved to the other so long as in "pith and substance" it falls within a power reserved to the enacting body. The issue is one of characterization. How would legislation concerned with foreign money claims be characterized? There is a strong element of property and civil rights—what is really at stake is the measure of a person's recovery on a certain type of claim in ordinary civil litigation—a provincial concern. How strong a case can be made for characterizing it as legislation in relation to currency?

Some guidance is to be found in the Supreme Court of Canada decision in *Attorney General for Ontario* v. *Scott*.[6] In issue was the power of an Ontario court to confirm, under the *Reciprocal Enforcement of Maintenance Orders*

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[1] 30 & 31 Vict. c. 3 (Imp.).
[2] R.S.C. 1970, c. C-39.
[3] Able, Laskin's Canadian Constitutional Law 574 (4th ed., 1973).
[4] *Supra*, n. 1, s. 92 (13).
[5] *Ibid.* s. 92 (14).
[6] [1956] S.C.R. 137.

Act,[7] an order made in another jurisdiction. In this case the reciprocating jurisdiction was England and the order was stated in terms of Sterling currency. The Act, unlike the present legislation, contained no explicit provision respecting currency conversion. It did, however, purport to permit the confirming court to confirm the order "with such modifications as . . . may seem just."[8] The power to "modify," it was asserted, permitted the confirming court to convert the Sterling amounts stated in the order into Canadian currency.

The person against whom the maintenance order was to be enforced sought an order prohibiting the confirming court from further proceedings. The *Reciprocal Enforcement of Maintenance Orders Act* was attacked as *ultra vires* on a variety of constitutional grounds. Among other things it was argued that the confirming court had no power to confirm and modify an order stated in a foreign currency.

At trial the application was denied. In reference to the currency issue, McRuer, C.J.H.C. stated:[9]

> I have also been troubled by the wording of subs. 3 of s. 5 of the Act in that it purports to give to the domestic Court a power to confirm an order made abroad in a currency other than the currency of Canada. Section 11 of *The Currency, Mint and Exchange Act*, R.S.C. 1952, c. 315, provides: "All public accounts throughout Canada shall be kept in the currency of Canada; and any statement as to money or money value in any indictment or legal proceeding shall be stated in the currency of Canada." It is obvious that the Province cannot confer on any tribunal a power to make an order in pounds, shillings and pence.
>
> However, subs. 3 of s. 5 states: ". . . the court may confirm the order either without modification or *with such modifications as to the court after hearing evidence may seem just*." (The italics are mine.) I think the last clause of this subsection empowers the Court in confirming the order to modify it so that it may be expressed in the currency of Canada, and, in fact, it has no power to do otherwise. Any other construction of the Act would defeat its whole purpose so far as it applies to reciprocating states outside of Canada.

The decision was appealed and the trial decision reversed.[10] The Act was held to be *ultra vires*, but on grounds other than the currency issue. The decision of the Court of Appeal was silent on this issue notwithstanding a strong submission by the appellant's counsel.[11]

The case went to the Supreme Court of Canada where the currency issue was again raised. Rand, J. for the Court stated:[12]

> Finally, it is said that the provision in the order stating the maintenance in terms of sterling currency is beyond the authority of an inferior court to confirm; but as pointed out by Chief Justice McRuer unde s-s. (3) of s. 5 the confirmation may be made with such modifications "as to the court may seem just". *The modification from one currency to that of this country is simply adopting a measure to determine the amount which the law of Ontario will obligate the husband to pay for maintenance*. I cannot agree that a reasonable basis of that sort can be objected to as beyond provincial legislative power.

To our mind the words emphasized are highly significant. They imply a characterization of the currency conversion issue as one of property and civil rights. In upholding the implicit power with respect to currency conversion, it seems clear the court would uphold more explicit currency conversion provisions such as section 70.4 (8) of the British Columbia *Family Relations Act*,

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[7] R.S.O. 1970, c. 334.
[8] *Ibid.* s. 5 (3).
[9] [1954] O.R. 246, 253.
[10] *Ibid.* at 676.
[11] *Ibid.* at 679.
[12] *Supra*, n. 6 at 144 [emphasis added].

section 33 of the *Court Order Enforcement Act*[13] and similar legislation in force in the other common law provinces. If a province may properly enact legislation calling for currency conversion as at the date of breach, it should be equally competent to stipulate an alternative date.

We believe there is no fundamental impediment to provincial legislation that provides a currency conversion rule for the purposes of valuing foreign money liabilities. In pith and substance it is a matter of property and civil rights within the province. We now turn to the question of whether one particular approach to conversion, the date of payment rule, is foreclosed by section 11 of the *Currency and Exchange Act*.

C. The Currency and Exchange Act

In Chapter II we identified section 11 of the *Currency and Exchange Act*[14] as one of the statutes that touch on foreign currency claims. For convenient reference we set it out again:

> All public accounts throughout Canada shall be kept in the currency of Canada; and any statement as to money or money value in any indictment or legal proceeding shall be stated in the currency of Canada.

We also expressed some doubts as to the efficacy of this provision in precluding Canadian courts from entering judgments expressed in a foreign currency and promised a more detailed discussion. That is the function of this section.

1. Does Section 11 Apply to Judgments?

(a) The Language of Section 11

In approaching the question set out in the heading one is immediately struck by the fact that the word "judgment" does not appear in section 11. Any conclusion that it does apply to judgments must therefore rest on an appropriate interpretation of other words which it contains.

Section 11 applies to three things: "public accounts," an "indictment," or a "legal proceeding." A judgment clearly does not fall into either of the first two categories so if it is caught at all, it is by the words "legal proceeding." If the intent of Parliament in using those words was to affect judgments, it is an odd choice of language. A much more appropriate formula could have been devised. The words "legal proceeding," convey an abstract notion of action, or of the whole or part of a suit. They are not ordinarily used to describe a particular document used in, or generated by, litigation or its outcome. The words "legal process" would be more apt for that purpose. Moreover, if "legal proceeding" is to be read so widely as to include a judgment, those words should also include an indictment. Why did Parliament feel it was necessary to set out "indictment" as a distinct thing to which section 11 applies unless "legal proceeding" bears some narrower meaning?

Given its widest reading section 11 would give rise to a number of anomalies. For example, it might be argued that any mention of foreign currency in any pleading is proscribed. We are not aware, however, that it has ever been seriously suggested that this is the case. In practice, the law seems to maintain a distinction between statements as to money value set out in pleadings and those set out in a judgment although this distinction is difficult to justify on the language of the Act.

(b) The History of Section 11

Obviously Parliament meant something in providing that money value in a "legal proceeding shall be stated in the currency of Canada," the question

[13] *See* Chapter II

[14] R.S.C. 1970, c. C-39

is: what? Was the intention of Parliament to enshrine, in a Canadian context, the common law "sue for sterling" rule?[15] Such a conclusion is difficult to support. The "sue for sterling" rule emerged in its modern form only in 1898 with the decision in *Manners* v. *Pearson*.[16] Section 11, however, has its origins in a statute of the Parliament of Canada enacted almost 30 years earlier in 1871.[17] An examination of that Act and other currency-related legislation that preceded it sheds some light on what Parliament intended to achieve by the enactment of this provision.

The currency legislation enacted at various times in Upper Canada and the Province of Canada is revealing. Before Confederation, 12 different acts had been passed dealing with this subject.[18] The first of these was enacted in 1796 and the last in 1853. The earlier statutes suggest that there was no Canadian currency as such but that a wide variety of foreign currencies circulated freely within the colonies.[19]

The thrust of much of the currency legislation was to identify those currencies acceptable as legal tender and to specify their value in terms of English currency and coinage, notionally the principal medium of exchange. The Act of 1841 for example provided rates for the conversion of currency or coinage of the United States, France, Spain, Mexico, La Plata, Columbia, Peru, Chile, Portugal and Brazil, all of which were specified to be legal tender.

The number of currencies in circulation was further increased by provisions that permitted coinage to be struck in the colony, first in "English" denominations[20] and later in decimal coinage.[21] It also appears that Nova Scotia had its own currency before joining Canada.[22]

The pre-Confederation situation, with its multiplicity of currencies, would strike the modern Canadian observer as chaotic. It is against that background that the Act of 1871, containing the precursor of section 11, must be read. Its long title, *"An Act to Establish One Uniform Currency for the Dominion of Canada,"* suggests its purpose. The aim was to replace all of the pre-confederation currencies in use with a single Canadian monetary unit.[23] In enacting that sums in "any indictment or legal proceeding" be stated in the money of Canada, the aim of the statute was to discourage proceedings framed in terms of any of the pre-Confederation currencies. Its target was domestic proceedings.

With this background in mind, it may be argued that section 11 of the *Currency and Exchange Act* is now spent. It was never intended by Parliament to limit or affect the rights of foreign litigants whose claims are properly stated in a foreign currency.

Section 11 of the *Interpretation Act* (Canada) provides:[24]

> Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

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[15] Riordan seems to hold this view. *See* Riordan, *The Currency of Suit in Actions for Foreign Debts*, (1978) 24 McGill L. J. at 438.

[16] *See* the discussion in Chapter II.

[17] *Uniform Currency Act*, S.C. 1871, c. 4, s. 3. The phrase "indictment or legal proceeding" is somewhat older. *See Currency Admendment Act* 16 Vict., c. 153, s. 2 (Upper Canada, 1853), where the use of specified currencies is permissive.

[18] 36 Geo. 3, c. 1 (1796); 49 Geo. 3, c. 8 (1809); 7 Geo. 4, c. 4 (1826); 11 Geo. 4, c. 6 (1830); 6 Will 4, c. 27 (1836); 3 Vict., c. 15 (1840); 4 & 5 Vict., c. 93 (1841); 13 & 14 Vict., cc. 8, 9 (1850) 14 & 15 Vict., cc. 47, 48 (1851); 16 Vict., c. 158 (1853).

[19] Similar legislation was enacted in British Columbia. *See Currency Ordinance* (April 2, 1867).

[20] 13 & 14 Vict. c. 8 (1850).

[21] 14 & 15 Vict., c. 47 (1851).

[22] *See Uniform Currency Act*, *supra*, n. 17, s. 4.

[23] The Act was extended to British Columbia in 1881 by 44 Vict., c. 4.

[24] R.S.C. 1970, c. I-23.

A court, bearing this rule of construction in mind, might well hold that the *Currency and Exchange Act* does not bar a properly framed judgment in a foreign currency on a *Miliangos* type of claim.

(c) Section 11 and the Courts

In the previous section it was argued that section 11 was first enacted to meet a particular problem that existed at the time of Confederation and that, given the degree of ambiguity in its language, the courts would be justified in construing it narrowly and in a way that would not prohibit, in an appropriate case, a judgment such as that given in *Miliangos*.

Notwithstanding that argument, the most widely held view is that section 11 does preclude such a judgment. Is this view mere popular mythology or does it rest on a solid basis of judicial authority?

In a number of cases the courts have suggested that section 11 precludes a foreign currency judgment.[25] In all but one case, however, these suggestions are *obiter dicta* arising where the right to a judgment stated in a foreign currency does not appear to have been urged on the court or where counsel had agreed that such a judgment is not available.[26] It might also be noted that none of this *obiter dicta* emanates from the Supreme Court of Canada. Two cases of that Court deal with currency conversion.[27] Both state that judgment must be in the currency of the forum, but that is treated as a common law rule and no mention is made of the *Currency and Exchange Act*.

The one decision in which application of section 11 to judgments was squarely in issue is *Baumgartner* v. *Carsley Silk Co.*,[28] a decision of the Quebec Court of Appeal. The appeal was from a decision of a trial judge ordering the payment of a specified sum in "U.S. dollars." The reasons of Montgomery, J.A., with whom Salvos and Lajoie, JJ.A. concurred, are brief:

> This is an appeal from a judgment of the Superior Court for the District of Montreal dated December 12, 1967, condemning appellant to pay $1,847.82, U.S. funds, for goods sold and delivered.
>
> The appeal is based solely on the fact that appellant is condemned to pay in the currency of a foreign country. It is therefore necessary to allude only briefly to the facts. Respondent, a corporation having its head office in West Germany, took action for the price of cloth delivered to appellant at the price stipulated in the contract of sale, which was in U.S. dollars. The defence was that the goods were not washable, and the trial Judge found this to be unfounded.
>
> Appellant did not in its pleadings complain of the fact that the condemnation sought was in U.S. dollars, though it raised the question in argument. The trial Judge disposed of this point as follows (at p. 9):
>
> > In its written notes the defendant submitted that, because plaintiff's action concluded for a sum in U.S. funds, such conclusions are illegal in virtue of s. 12 (1) of the *Currency, Mint and Exchange Act*, R.S.C. 1952, c. 315. However, as stated in such notes, U.S. funds are readily available and persons here are all accustomed to dealing with them. In the circumstances, the Court does not consider that it would be justified in accepting the argument of defendant in this respect in this case.
>
> With all respect, I am of the opinion that this defence, however technical, is well founded. I agree with appellant that the proceedings as instituted by respondent were in violation of the *Currency, Mint and Exchange Fund Act*, R.S.C. 1952, c. 315 [now R.S.C. 1970, c. C-39], to which the trial Judge refers, s. 11 of which reads as follows:

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[25] *Am-Pac Forest Products Inc.* v. *Phoenix Doors Ltd.*, (1979) 14 B.C.L.R. 63 (B.C.S.C.); *Batavia Times Publishing Co.* v. *Davis*, (1978) 7 C.P.C. 105, 20 O.R. 437 (Ont. S.C.); *Gross* v. *Marvel Office Furniture Ltd.*, (1979) 9 C.P.C. 103 (Ont. S.C.); *National Westminster Bank Ltd.* v. *Burston*, (1980) 16 C.P.C. 27, 28 O.R. 701 (Ont. S.C.); *A.G. Ont.* v. *Scott*, *supra*, n. 9.

[26] *Batavia Times*, *ibid.*

[27] *Custodian* v. *Blucher*, [1927] S.C.R. 420; *Gatineau Power Co.* v. *Crown Life Insurance Co.*, [1945] S.C.R. 655.

[28] (1971) 23 D.L.R. (3d) 255.

> **11.** All public accounts throughout Canada shall be kept in the currency of Canada; and any statement as to money or money value in any indictment or legal proceeding shall be stated in the currency of Canada.
>
> I cannot accept respondent's argument that this section applies only to public accounts. The latter part of the section is quite general in its terms, and the following s. 12 clearly applies to private agreements.

He went on to state another ground for rejecting the judgment. It was not susceptible of execution under the Quebec *Code of Civil Procedure*.[29]

In summary, while the accepted view of section 11 is not bereft of judicial authority, the weight of that authority is far from overwhelming. In particular, there seems to be no authority that binds the British Columbia courts to the accepted view.

2. Is Section 11 Intra Vires?

Assuming that section 11 does bear the most widely accepted meaning, from what source does the Parliament of Canada derive its authority to legislate on this matter? The statutory context, the *Currency and Exchange Act*, suggests that it is in the purported exercise of federal power to legislate in relation to currency and coinage given by the *Constitution Act, 1867*.[30]

Brian Riordan, in his comment on *Miliangos*, has questioned whether section 11 is a valid exercise of federal power:[31]

> A strong argument could be made that section 11 is *ultra vires* the Parliament of Canada, being in relation to "the administration of justice in the province . . . including procedure in civil matters." It is true that section 91:14 of the *British North America Act* gives Parliament exclusive legislative jurisdiction over "currency and coinage," and the greater part of the *Currency and Exchange Act* seems to be dealing with exactly that: denominations (section 3), current and defaced coins (section 6), legal tender (section 7), redemption of coins (section 8), counterfeit coins (section 9), melting down coins (section 10). However, section 11 appears to be an anomaly. It clearly does not seem to relate to the same subject matter to which the rest of the Act is directed (currency and coinage). Given this, it is easier to argue that its "pith and substance" relates to "procedure in civil matters," which would make it *ultra vires* Parliament and of no effect. This would result notwithstanding the fact that there is no provincial legislation in this area; section 92 of the 1867 Act gives *exclusive* legislative authority to the provinces.

Whether or not the courts would strike down, or narrow the effect of, section 11 on constitutional grounds if the issue were put squarely to them is a difficult issue. Riordan makes a persuasive case for, at least, concurrent provincial jurisdiction in this area. A fruitful line of inquiry, therefore, may be to see if provincial legislation might be framed in a way that achieves the result of the date of payment rule but which can stand together with section 11.

3. Can Section 11 be Avoided?

Following *Miliangos*, a practice direction was issued by the Queens Bench Division of the English High Court.[32] The practice direction specified, *inter alia*, the forms of judgment to be used in foreign currency cases. The exact language to be used is:[33]

> It is this day adjudged that the Defendant do pay the Plaintiff *(state the sum in foreign currency in which judgment has been ordered to be entered)* or the sterling equivalent at the time of payment.

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[29] S.Q. 1965, c. 80, art. 469.

[30] 30 & 31 Vict., c. 3, s. 92 (14) (Imp.).

[31] *Supra*, n. 15 at 438. *Compare*, Chebil, *Les Jugements Relatifs aux Creances Libellees en Monnaie Etrangere en Droit Anglais, Francais et Canadien*, (1982) 27 McGill L.J. 299.

[32] [1976] 1 W.L.R. 83. The practice direction is set out in full as an Appendix to this paper.

[33] *Ibid.* Clause 9.

A British Columbia adaptation of this form of order might be as follows:[34]

> THIS COURT ORDERS that the defendant(s) _____ pay to the plaintiff(s) *(state the sum in foreign currency in which judgment has been ordered to be entered)* or the equivalent, at the time of payment, in Canadian currency, [interest as claimed (*or,* interest pursuant to the *Court Order Interest Act*) in the amount of $_____ ,] and $_____ costs [*or,* and costs to be taxed].

Could a judgment framed in this way be given effect without violating section 11?

Arguably it could. One commentator has stated (post *Miliangos*):[35]

> A judgment sounding in money must be expressed in Canadian currency though possibly, it might be lawful to express the judgment in a foreign currency or its equivalent in Canadian currency at some future time.

A reference to Canadian currency in a judgment might be sufficient to avoid repugnancy with section 11.

D. Summary

It is our conclusion that there are no basic constitutional barriers to the enactment, by the Province, of legislation on the conversion date with respect to foreign money claims. Whether or not such legislation could take the form of a date of payment conversion rule is a slightly more difficult issue. It would conflict with the accepted view of section 11 but a number of arguments can be raised in support of such a provision. They may be summarized as follows:

1. A provincial enactment drafted similarly to the English practice direction would not conflict with section 11 as it would contain a statement as to money value in Canadian currency.
2. Judicial authority for the accepted view of section 11 is not strong and if there is a conflict, the provincial enactment would prevail because:
   (a) the language of section 11 is ambiguous and does not necessarily apply to judgments,
   (b) Parliament did not intend that section 11 should extend to "foreign" causes of action litigated in Canadian courts; it was meant to suppress references to pre-Confederation currencies in domestic litigation.
   (c) section 11 is ultra vires the Parliament of Canada as it purports to regulate procedure in civil matters, which is within the exclusive legislative jurisdiction of the provinces.

Obviously in uncharted constitutional waters such as these, no guarantee can be offered that such arguments would ultimately succeed, but a strong case can be made that unilateral provincial action to give force to a date of payment conversion rule would be upheld in the courts.

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[34] *See* the form(s) of order set out in Form 83 of Appendix A to the Rules of Court (British Columbia).

[35] Fraser and Horn, The Conduct of Civil Litigation in British Columbia 1018 (1979).

CHAPTER VII THE WORKING PAPER AND THE RESPONSES

A. The Working Paper

Late in 1981 we circulated a Working Paper dealing with this topic.[1] In it we explored the recent English developments, the background to them and the response of the Canadian courts. The Working Paper concluded by setting out tentative proposals for changes in the law.

The Working Paper was widely circulated within the business community. Copies were sent to the local representatives of Canada's major international trading partners and to practicing and academic lawyers whose areas of interest and expertise touch on foreign money claims. The responses that the Working Paper attracted were relatively large in number and were rich in content. They provided much food for thought as our final recommendations were developed.

In the Working Paper the Commission tentatively concluded that a move away from the rigid application of the breach date rule would result in an improvement in the law and we considered whether reform should take the form of a date of judgment or a date of payment conversion rule. We were attracted, in principle, to the latter and the question was whether this would be precluded by section 11 of the *Currency and Exchange Act*. It was our tentative view that the Province was not precluded from legislating to provide a date of payment rule, particularly if it adopted a form of judgment such as that described in Chapter VI of this Report.

It was our provisional view that the English developments provided the best model for reform and our aim should be "to achieve through legislation a legal position that in England has been achieved through judicial development."[2] We then turned to the issue of how that might best be done:[3]

> A basic question we have considered is what approach should be adopted in formulating legislation to achieve a date of payment rule in appropriate cases. We believe the best strategy is to prescribe the use of a particular form of judgment in these cases, one which, as far as possible, ensures that conflict with section 11 of the *Currency and Exchange Act*, and other federal statutes, will be minimized and which leaves the courts some basis on which to hold that the provisions are not mutually exclusive but can stand together.
>
> What legislative language should trigger the use of a judgment in the form described above? It is our provisional view that the tendency of the English case law that has emerged since *Miliangos* is satisfactory, and that the "triggering provision" should be framed in a way which will point the British Columbia courts towards the English jurisprudence. The issue is how far any attempt should be made to comprehensively restate, in legislative form, the jurisprudence that has emerged from cases such as *The Folias* and *The Despina R*. The alternative is to provide a relatively simple statement of principle on the assumption that counsel and the courts will be sufficiently alive to the English developments to ensure that they are not overlooked as British Columbia jurisprudence develops.
>
> Our preference is for the latter course. There is always a risk in attempting a legislative restatement of a body of judge-made law. The result may be wider than necessary or it may be unduly confining. Moreover, any elaborate restatement may have the appearance of a "code" that precludes consideration of any English cases that may emerge in the future. This, we believe, would be an undesirable development. The extent to which English cases on currency conversion, both before and after *Miliangos*, have been cited and, where possible, followed in the Canadian courts encourages a view that the recent cases are not likely to be disregarded.

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[1] Law Reform Commission of British Columbia, Foreign Money Liabilities (Working Paper No. 33, 1981).
[2] *Ibid.* at 99.
[3] *Ibid.* at 96.

A similar issue arises as to whether reforming legislation should contain any reference to prejudgment interest. As we indicated in a previous chapter, we believe the *Court Order Interest Act* will provide the courts with a sharp and powerful tool to achieve a just result in the "hard cases." Again we believe that counsel and the courts will be sufficiently alive to the interest issue that no specific reference should be necessary.

The specific proposals for reform set out in the Working Paper were as follows:[4]

1. Legislation be enacted which reflects the following principles:
   (a) In circumstances where a currency other than the currency of Canada will most truly express a person's loss or claim and will most fully and exactly compensate him then a court should order that judgment be entered in a form comparable to the following:

   THIS COURT ORDERS that the defendant(s) ____pay to the plaintiff(s)
   (i) (*state the sum in foreign currency in which judgment has been ordered to be entered*), and
   (ii) (interest as claimed *or*, interest pursuant to the *Court Order Interest Act*)

   or the equivalent, at the time of payment, in Canadian currency, and costs to be taxed.
   (b) Notwithstanding (a) a court should have a discretion to order conversion to Canadian currency at the exchange rate prevailing on any other date between the date of breach and the date of payment, such discretion to be exercised only in exceptional circumstances to do justice between the parties.
   (c) Paragraphs (a) and (b) should apply *mutatis mutandis* to arbitration proceedings.
2. No special provisions should be enacted to deal with the "hard cases." It should be left to the courts in appropriate cases to compensate for late payment by an award of prejudgment interest or damages.
3. Corresponding amendments should be made to those provincial enactments that have given legislative force to the date of breach rule for currency conversion.

Special comment was invited on Proposal 1 (b), which would give the court a limited discretion with respect to conversion dates.[5]

The Working Paper concluded by pointing out that further work would be necessary to develop an appropriate body of procedural rules to govern the assertion and enforcement of foreign currency claims. We left open the question whether this should be done by the Commission in the context of our final Report or whether it might appropriately be delegated to another body.[6]

B. Responses to the Working Paper

1. Continued Adherence to the Breach Date Rule

Our respondents were almost unanimous in their support for the view expressed in the Working Paper that the law should no longer call for rigid adherence to the breach date rule for currency conversion. The sole exception was Messrs. Bowles and Whelan whose submission is discussed in Chapter IV.

2. The Constitutional Issue

Among those respondents who commented on the issue, there was almost unanimous agreement that legislation along the lines proposed would be *intra vires* the Province.

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[4] *Ibid.* at 98.
[5] *Ibid.*
[6] *Ibid.* at 101.

3. The Approach to Reform

Those of our respondents who expressed a pro-reform view fell into three groups. One group indicated no particular views as to the approach that should be taken in a move away from the breach date rule. A second group, by far the largest, expressly agreed with the approach taken by the Commission in the Working Paper. The remainder expressed views somewhat at variance with the Working Paper proposals.

Two of the last group expressed concern that the formulation of our proposals detracted from what they saw as a desirable flexibility in this area. The most detailed comment was from Professor Waddams:[7]

> In its conclusion the Commission states that its "relatively modest" goal is "to achieve through legislation a legal position that in England has been achieved through judicial decision development." But if this is the object it would surely be better achieved by giving to Canadian courts the same general power that English courts now have, not by incorporating into a statute some phrases from recent English cases-phrases which will probably be modified within a year or two. The English courts are not at present bound by formulations such as those proposed by the Commission; it does not seem desirable for Canadian legislatures to enshrine them, especially if, as is all too probable, each Province selects a different formulation.
>
> The writer would accept the desirability of giving the courts power to postpone the date of currency conversion up to the date of payment. It seems important, however, to leave to the courts the maximum possible degree of flexibility. The Commission, earlier in its paper expresses reservations about a judicial discretion on the ground of uncertainty. Two points may be made here. First, there is a difference between a statute that expressly says that there is to be a judicial discretion and a statute that gives the courts a power. The former may be interpreted to mean that the discretion of individual judges is not to be fettered by principles. The latter certainly cannot mean that, and giving the courts a power to depart from the breach date rule in appropriate cases does not mean that the power will be exercised in an arbitrary or unprincipled way; the opposite is to be expected. All equitable remedies are "discretionary", but they are not therefore exempt from principled application and development. It could be expected that a power to award judgment in foreign currency would be exercised on the same sort of principles as govern the power to decree specific performance of contract; the two things are closely analogous, as was pointed out in the *Miliangos* case itself. The second point is that almost the whole area of remedies is left to the courts, for good reason, as Lord Wilberforce said. A statute that is too narrowly drafted is not conducive to rationality or justice, and probably not to certainty either, for it will tend to accumulate complex judicial glosses.
>
> It is appreciated that the Commission's tentative recommendations are not a draft bill, but presumably a statute along the lines proposed is contemplated. Presumably too, as the context of the paper shows, the court will be bound, in cases falling within the rule, to enter judgment in foreign currency (subject to the discretion contemplated in paragraph (b), which is narrow, and in any event may not form part of the final proposals). The Commission says "no special provision should be enacted to deal with the 'hard cases'" but the wording of the statute proposed will invite a discussion of the justice of its application in all the kinds of cases considered above—those that are potentially overcompensatory as well as those the Commission recognizes as hard cases. In all controverted cases it will be arguable that the foreign currency does not "express" the plaintiff's loss, or does not express it "truly" or does not express it "most" truly; that it does not "fully" compensate or that it does not "exactly" compensate or that it does not fully "and" exactly compensate, or that there is an important difference between a "claim" (to which the words about compensation apparently do not apply) and a "loss" to which they do. The writer does not of course object to flexibility—the proposed statute would be worse without it—but he does question the utility of requiring the court to achieve flexibility by a process of construing inherently vague statutory words culled from English cases. Would it not be simpler to provide that the court has a power to do what justice requires?

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[7] *Waddams*, "Commentary on Foreign Money Liabilities," (1981-82) 6 Can. Bus. L.J. 364

Turning then to the question of what the court should be empowered to do, it would seem that the substance of the result reached in the *Miliangos* case could be achieved by providing that the court shall have power to order payment of such a sum in Canadian dollars as shall at the date of payment be equivalent to a named sum in foreign currency. There would, of course, just as in the case of a power to give judgments in foreign currency, be a need for ancillary rules of practice to deal with problems of enforcement, set-off, and payment into court.

A submission from another source approached the currency issue in a somewhat different fashion:

[My] proposal is that the question of proper "date of conversion" be treated as one, not of law, but of fact: (i) In cases of contract, if the plaintiff had received his money when his cause of action arose ("due date"), what currency would he have used, kept, or put it in? (ii) In cases of tort, in what currency did the plaintiff really suffer damages?

If the question of the proper currency *can* in this way be answered as a matter of fact, it seems difficult today to justify an award other than the sum which would, at date of judgment, have been available to the plaintiff, had he kept the money in the meantime in the country of that currency at the interest available there. The difficulty presented by such an approach is that it is not always possible to answer the question as a matter of fact—in some cases it will be impossible to say in what currency the plaintiff would most probably have put (or kept) the money, or in what currency he really suffered his damages. The method traditionally adopted by the law when faced with a question of fact which may not always be answerable is to adopt a presumption which will apply unless rebutted.

The most appropriate such presumption, in the present context, is that had the plaintiff received the money when due, he would have put it into Canadian funds, or, alternatively, that it was in Canadian funds that his damages were in fact suffered. If it were in the interest of either plaintiff or defendant to rebut that presumption, either would be entitled to do so.

Thus a Canadian exporter selling fish for Japanese yen to a buyer in Japan who failed to pay would *prima facie* be presumed to have intended to convert the foreign money into Canadian dollars on the day it should have been paid. He would be credited at trial that amount plus normal pre-judgment interest (based on Canadian short-term safe investment rates) to date of judgment. It would be open to either party, however, to prove that the plaintiff would more probably have kept the funds in Japan, and have deposited or used them there. If that were established, the plaintiff would be entitled to judgment for the Canadian equivalent of the Japanese currency which should have been paid on the due date plus Japanese short-term safe investment interest from that date to the date of judgment.

CHAPTER VIII

CONCLUSIONS

A. Reform Generally

We believe the mood of law reform in this area is clear: a move away from the rigid application of the breach-date rule for currency conversion is widely regarded as a desirable development. In England, *Miliangos* has been warmly received and the payment date rule which it embodies appears to be working well in practice. In Canada, there appears to be a similar enthusiasm for change.

The lone dissenting voices are those of Messrs. Bowles and Whelan. We believe they are correct when they assert that the advantages of the *Miliangos* rule over the breach-date rule have been greatly overstated. We agree that with appropriate awards of prejudgment interest the plaintiff's recovery should not be significantly less under the beach-date rule than under a date of payment rule, in many cases. The difficulty is that this holds true only in the absence of a number of factors which can distort the relationship between interest rates and currency exchange rates. The presence of such factors can lead to different recoveries, and depending on which rule is applied, a gap may result.

In pointing to the *Miliangos* litigation, Bowles and Whelan acknowledged the existence of such a gap but assert that this occurred when "the pound was going through a particularly bad time." This, we believe, goes to the heart of the matter. Why should the Swiss plaintiff have been concerned whether the pound was going through a good time or a bad time? Surely, only the performance of his own currency should affect his recovery. He should neither suffer a loss nor gain a windfall through distortions which affect the performance of a currency in which he is essentially disinterested. The burden of "hedging" against the possibility of adverse currency fluctuations should rest on the defendant.[1] Giving judgment in the plaintiff's currency and awarding prejudgment interest at the rate appropriate to that currency will achieve that position.

Bowles and Whelan also argue that any departure from the breach-date rule creates uncertainty both as to the circumstances in which a court will make an award in terms of a foreign currency and what that currency will be. This uncertainty is said to encourage delay and discourage the settlement of claims. Whether this argument has any force in England, which attracts a higher proportion of complex international, commercial and shipping litigation, we do not know. In its application to British Columbia, however, we believe the argument overstates both the extent of the uncertainty that would be created by adopting the *Miliangos* rule and the adverse effect of that uncertainty.

The vast majority of cases in British Columbia which have a foreign money element will be simple contract cases involving a foreign supplier or lender claiming payment in his own currency as stipulated in the contract. In these cases there is little room for uncertainty as to whether the plaintiff's claim is properly asserted in a foreign currency and what that currency is. This view is supported by the reported Canadian cases which have arisen since *Miliangos* and in which its effects have been tested.

In summary, the response to the Working Paper which we have received and further consideration of the issues involved, fortify our view that the law

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[1] It has also been suggested that placing the burden of hedging on the defendant is the sounder approach from an economic perspective. *See* S. A. Rea, *Inflation and the Law of Contracts and Torts*, (1982) 14 Ottawa L. Rev. 465 at 474-5.

should no longer adhere rigidly to the breach-date rule for currency conversion. Our final conclusion, therefore, is that legislation should be enacted which will permit the British Columbia courts to adopt a date for currency conversion other than the date of breach with respect to foreign money liabilities.

B. The Conversion Date

In the Working Paper we identified the date of payment rule as the one which, in principle, should be applied by the courts. We expressed some hesitation, on constiutional grounds, as to the Provincial competentence to legislate in the light of section 11 of the *Currency and Exchange Act* (Can.). The alternative, constitutionally unimpeachable, course would be to provide for a date of judgment conversion rule.

We reconsidered the constitutional issue in the light of the response attracted by the Working Paper. Our final conclusion is that, while the adoption of a date of payment rule is not totally free of doubt on constitutional grounds, this doubt does not justify a retreat to a second-best legal position. There are strong arguments in favour of provincial competence and we believe they form a sufficient and credible basis for legislation by the Province. These arguments are set out in Chapter VI of this Report.

We have therefore concluded that reforming legislation should permit a British Columbia court, in appropriate cases, to make an order in terms which refer to a foreign currency or its equivalent, at the time of payment, in Canadian currency.

C. When Is a Foreign Currency Judgment Appropriate?

In what circumstances should the plaintiff receive judgment in a foreign currency rather than that of the forum? The proposal in our Working Paper answered the question this way:

> In circumstances where a currency other than the currency of Canada will most truly express a person's loss or claim and will most fully and exactly compensate him then a court should order that judgment be entered in [the form proposed].

The language of the proposal drew on the English jurisprudence. This was a reflection of our aim to attempt to reproduce the English legal position (post-*Miliangos*) through legislation.

This formulation was seen by one commentator, Professor Waddams, as either lacking in "flexibility," or achieving "flexibility" in the wrong way. He advocated simply empowering the courts to "do what justice requires" and allowing principled decisions to develop the legal position. This is an enticing suggestion but it carries difficulties of its own.

Flexibility is not universally regarded as a desirable feature of such legislation. Bowles and Whelan, in their submission, urged us that if we did not accept their views concerning adherence to the breach-date rule, whatever alternative position was adopted, it should be a rigid rule for commercial certainty. Other respondents commented on the desirability of certainty.

Our own view is that it would be undesirable to enact legislation so "flexible" that it would require several years before a body of jurisprudence developed which would permit foreigners doing business in British Columbia to order their affairs with confidence. To that extent we agree with the proponents of a rigid rule.

We believe that our initial goal, to assimilate British Columbia law to that of England, is a sound one. The English developments have provided a model

of law reform which has been favourably received and appears to have worked well. To adopt any other approach to reform is to run a risk of achieving results less satisfactory than those which have been achieved in England.

The task, therefore, is to identify a legislative formulation which will realize our goal. The language proposed in the Working Paper represented our best attempt, at the time, to capture the essence of the English position. Most of those who responded to the Working Paper appeared to be satisfied with it and no alternative formulations were proposed which were superior. Nothing in the response which we have received or our own subsequent deliberation, has convinced us that a retreat from the language of the Working Paper proposal is called for and we have concluded that it should be adopted as part of our final recommendations.

D. A Judicial Discretion

In the Working Paper we discussed the possiblity of giving the court a limited discretion with respect to the choice of conversion date to deal with any unusual cases which might arise. We described this as a possible "safety valve" for exceptional cases in which the ordinary rules might lead to an injustice. Accordingly, in the Working Paper, for the purposes of discussion, we made the following proposal:

> 1. (b) Notwithstanding (a) a court should have a discretion to order conversion to Canadian currency at the exchange rate prevailing on any other date between the date of breach and the date of payment, such discretion to be exercised only in exceptional circumstances to do justice between the parties.

In the Working Paper we stated that we had not been able to identify any exceptional cases in which the discretion conferred might be exercised, but comment was invited both on its utility and the kind of cases in which it might be used to achieve a fair result that would otherwise be unattainable. We indicated that if no such cases emerged, the proposal might not form part of our final recommendations.

The comment which we received on the proposal was mainly negative. No one identified a situation where it might be usefully invoked. Those who commented on it were in general agreement that such a discretion should not be included as part of our final recommendations.

This issue is one which has given us considerable difficulty. On one hand, because the proposal calls for "exceptional circumstances" before the discretion may be exercised, it is relatively narrow and, arguably, would do no harm. On the other hand, such a discretion does detract from the certainty which would flow from a firmer rule and, given the fact that a satisfactory example of its use has still not emerged, it is difficult to justify its adoption.

We have fully reconsidered this issue and a degree of uncertainty remains. It is the final conclusion of the Commission as a whole that a provision such as that described above should not be included in reforming legislation, although among the individual members of the Commission there are varying degrees of unease concerning the possible effects of its exclusion.

E. Ancillary Rules

In the Working Paper we recognized that a group of ancillary procedural rules would be necessary if the British Columbia courts were to be empowered to give foreign currency judgments. We left open the question whether the Law Reform Commission was the appropriate body to develop these rules. It

is our conclusion that this is a task which can safely be left to the rules committee or to an *ad hoc* body.

F. Consequential Reforms

1. Court Order Interest Act

In an earlier chapter we pointed out that the terms of the *Court Order Enforcement Act*[2] are broad enough to permit the courts to adopt a rate of prejudgment interest appropriate to a foreign currency in which judgment may be given. We have considered whether the Act should be amended to provide some specific guidance to judges when a foreign money claim is in issue.

As mentioned in Chapter V, the *Malta Drydocks* case illustrates that it is possible for courts to err in their approach to prejudgment interest.[3] We have concluded that the Act should be suitably amended to minimize the possibility of such error. The amendment we envisage would not change the substance of the Act but would simply "flag" the foreign interest rate as a relevant factor in the exercise of the court's discretion under the Act.

The issue of postjudgment interest should also receive attention. In British Columbia interest after judgment is currently regulated by the *Interest Act* (Canada)[4] and all judgments (including one stated in a foreign currency if that were permitted) attract interest at five percent. There are indications, however, that the Federal government may soon withdraw from the field and leave the regulation of postjudgment interest to the provinces.[5]

Such a development is implicit in recent amendments to the *Court Order Interest Act* which would provide for the setting of rates of postjudgment interest. The amendments come into force "on the date sections 12 to 15 of the *Interest Act* (Canada) cease to have effect in British Columbia."[6] The amendments to the *Court Order Interest Act* contemplate a postjudgment interest rate determined with reference to a prime lending rate, and adjusted every six months to reflect fluctuations in that rate, so long as the judgment remains unpaid. The court, however, would have a discretion to vary the rate.

Again, in the context of a foreign money judgment, the foreign rate of interest would appear to be relevant to the exercise of this discretion, but periodic adjustments of this rate, after the judgment has been entered raises special problems. Because the prime rate is not a relevant guide to the parties, the adjustment would seem to call for a fresh application by one or other of the parties every six months unless other machinery can be devised.

We make no recommendation on this issue; but do commend it to the attention of those charged with developing the ancillary rules of practice referred to above.

2. Reciprocal Enforcement Legislation

In Chapter II we noted two provincial Acts which embody the date of breach rule for currency conversion. Those Acts should be amended to give effect to a date of payment rule.

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[2] R.S.B.C. 1979, c. 76.

[3] *See* Chapter V, text at note 13.

[4] R.S.C. 1970, c. I-18, ss. 12-15.

[5] That is already the situation in Ontario. *See Judicature Act*, R.S.O. 1980, c. 223, s. 37. The 5% rate applies only in the western provinces. *See Interest Act*, *supra*, n. 4, s. 12.

[6] *Court Order Interest Amendment Act*, 1982, S.B.C. 1982, c. 47.

3. Federal Legislation

While it is not appropriate for us to set out specific recommendations for the reform of Federal enactments, we do believe that the need for reform in that sphere should not be overlooked.

First, section 11 of the *Currency and Exchange Act* might be reviewed in the light of the English developments and the recommendations made in this Report. Depending on the outcome of that review it might be repealed or suitably amended to clarify its proper sphere of operation. The sections of the Act concerning legal tender might also be examined from the same perspective.

Second, whether or not legislation which implements our recommendations would be applied by the Federal Court of Canada is a difficult question. It is also an important one having regard to that Court's jurisdiction with respect to shipping claims. It may be that specific legislation will be required in this area.

Finally, all Federal statutes and regulations should be reviewed for currency conversion provisions which are inconsistent with the date of payment rule, and consideration given to whether that inconsistency is justified by the policy of the enacment.

CHAPTER IX

RECOMMENDATIONS AND ACKNOWLEDGMENTS

A. Recommendations

Set out below are the Commission's formal recommendations which are based on the conclusions stated in the previous chapter. We reiterate that our aim is to assimilate the law of British Columbia to that of England and the language of our principal recommendation is based on the English case law.

The Commission's recommendations are:

1. *Legislation be enacted which reflects the following principles:*
   (a) *In circumstances where a currency other than the currency of Canada will most truly express a person's loss or claim and will most fully and exactly compensate him then a court shall order that judgment be entered in a form which states the defendant's liability in the other currency or the equivalent, at the time of payment, in Canadian currency.*
   (b) *Paragraph (a) should apply* mutatis mutandis *to arbitration proceedings.*[1]
2. (a) *Ancillary rules of practice concerning the assertion and enforcement of foreign money claims should be promulgated under the* Court Rules Act.[2]
   (b) *The form of judgment provided by the rules should be comparable to the following:*

   THIS COURT ORDERS that the defendant(s) _____ pay to the plaintiff(s)
   (i) (state the sum in foreign currency in which judgment has been ordered to be entered), *and*
   (ii) (*interest as claimed* or, *interest pursuant to the* Court Order Interest Act)
   or the equivalent, at the time of payment, in Canadian currency, and costs to be taxed.
3. *The* Court Order Interest Act *should be amended by adding a provision to the effect that the court, in the exercise of its discretion as to the rate of interest, should, when awarding interest on a judgment stated in a foreign currency, have regard to the foreign interest rates which prevail with respect to that currency.*
4. *Section 33 of the* Court Order Enforcement Act *and section 70.4 (8) of the* Family Relations Act *should be amended to give effect to the principles set out in Recommendation 1.*

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[1] Arguably, a specific recommendation relating to arbitration proceedings is unnecessary as an arbitrator may, by operation of law, be clothed with a power of this kind which is given to a court. *See Re Westcoast Transmission and Majestic Wiley*, (1982) 139 D.L.R. (3d) 97, 103 *per* Seaton, J.A. (B.C.C.A.)

[2] *Court Rules Act*, R.S.B.C. 1979, c. 77.

B. Acknowledgments

We wish to express our great appreciation to all those who responded to the Working Paper which preceded this Report. As we indicated in an earlier chapter, the responses we received were both numerous and helpful. The reasoned submissions which we received greatly assisted in sharpening our views on the relevant issues.

We also wish to acknowledge the contribution of two former members of the Commission who played an important role in this project: Messrs. Peter Fraser and Kenneth C. Mackenzie. Both participated in the development of the Working Paper and Mr. Mackenzie, whose appointment as a Commissioner expired only shortly before this Report was finalized, assisted in the development of our final recommendations.

JOHN S. AIKINS
BRYAN WILLIAMS
ANTHONY F. SHEPPARD
ARTHUR L. CLOSE

Commission member Ronald I. Cheffins did not participate in the making of this Report.

September 22, 1983

APPENDIX

PRACTICE DIRECTION (U.K.) QUEEN'S BENCH DIVISION
[1976] 1 W.L.R. 83

CLAIMS AND JUDGMENTS IN FOREIGN CURRENCY

(0.6, r. 2; 0.13; 0.14; 0.19; 0.22; 0.42; 0.45; 0.50; 0.51)

1. Subject to any Order or Directions which the Court may make or give in any particular case, the following practice shall be followed in relation to the making of claims and the enforcement of Judgments expressed in a foreign currency.

Claims for Debts or Liquidated Demands in Foreign Currency

2. For the purpose of ascertaining the proper amount of the costs to be endorsed on the Writ pursuant to R.S.C. Order 6 Rule 2 (1) (b), before a Writ of Summons is issued in which the Plaintiff makes a claim for a debt or liquidated demand expressed in a foreign currency, the Writ must be endorsed with the following Certificate, which must be signed by or on behalf of the solicitor of the Plaintiff or by the Plaintiff if he is acting in person:

> Sterling equivalent of amount claimed
> I/we certify that the rate current in London for the purchase of *(state the unit of the foreign currency claimed)* at the close of business on the day of 19 *(being the date next or most nearly preceding the date of the issue of the Writ)* was to the £ Sterling and at this rate the debt or liquidated demand claimed herein, namely *(state the sum of the foreign currency claimed)* amounts to £ or exceeds £650 *(as the case may be)*.
> Dated the day of 19
>
> Signed
> (Solicitor for the Plaintiff)

Pleading Claims for Debts or Liquidated Demands in Foreign Currency

3. The Writ or Statement of Claim in which a claim is made for payment of a debt or liquidated demand in foreign currency must contain the following statements, namely:

(i) that the contract under which the debt is claimed in the foreign currency is governed by the law of some country outside the United Kingdom; and

(ii) that under *that* contract the money of account in which the debt was payable was the currency of that country or of some other foreign country.

Default Judgment for Debts or Liquidated Demand in Foreign Currency

4. A Judgment in Default of Appearance or in Default of Defence may be entered in foreign currency by adapting R.S.C. Appendix A. Form 39, as follows:

> It is this day adjudged that the Defendant do pay the Plaintiff *(state the sum in which foreign currency is claimed)* or the Sterling equivalent at the time of payment.

Judgment under Order 14

5. Wherever appropriate, a Judgment under R.S.C. Order 14 Rule 3 may be entered for a debt or liquidated demand in foreign currency by adapting R.S.C. Appendix A. Form 44 as follows:

> It is this day adjudged that the Defendant do pay the Plaintiff *(state the sum in foreign currency for which the Court has ordered Judgment to be entered)* or the Sterling equivalent at the time of payment and £ costs (or costs to be taxed).

The amount of the Fixed Costs will be calculated on the sterling equivalent of the amount of the foreign currency claimed as endorsed and certified on the Writ, unless the Court otherwise orders.

Transfer to the County Court

6. On the hearing of an application for an order that under the County Courts Act 1959, Section 45, for the transfer to a County Court of an action for a debt or liquidated demand expressed in foreign currency, on the ground that the amount claimed or remaining in dispute does not exceed £1,000, the Court will have regard to the sterling equivalent of the foreign currency claimed as endorsed and certified on the Writ, unless at the time of the application it is shown to the Court that the said sterling equivalent does exceed the sum of £1,000.

Payment of foreign currency into Court in satisfaction

7. In an action for the recovery of a debt or liquidated demand, whether in sterling or in foreign currency, the Defendant may, subject to the requirements of the Exchange Control Act 1947, pay into Court in satisfaction of the claim, under R.S.C. Order 22 Rule 1, a sum of money in foreign currency by adapting Form No. 2 of the Supreme Court Fund Rules 1975. If it is desired that the money should be placed on deposit after the expiry of 21 days the necessary directions must be given on a Part II Order.

Orders for Conditional payment of foreign currency into Court

8. Where the Court makes a conditional order for payment of money into Court e.g. when granting conditional leave to defend on an application for Summary Judgment under Order 14, or when setting aside a default Judgment or granting an adjournment of the hearing of a Summons or the trial or hearing of an action or making any other order conditional upon payment of money into Court, the Court may order that such money be paid into Court in a foreign currency, and the Court may further order that such money should be placed in a foreign currency account and if practicable should be placed in such an account which is an interest bearing account.

Entry of Judgment in Foreign Currency

9. A Judgment may be entered in foreign currency by adapting the relevant Forms in R.S.C. Appendix A as follows.

It is this day adjudged that the Defendant do pay the Plaintiff *(state the sum in foreign currency in which Judgment has been ordered to be entered)* or the sterling equivalent at the time of payment

Interest on Judgment debt in foreign currency

10. A Judgment entered in foreign currency will carry the statutory rate of interest on the amount of the Judgment in foreign currency and such interest will be added to the amount of the Judgment itself for the purposes of enforcement of the Judgment

Enforcement of Judgment debt in foreign currency by Writ of Fi. Fa.

11. (a) Where the Plaintiff desires to proceed to enforce a Judgment, expressed in foreign currency by the issue of a Writ of Fieri Facias, the Praecipe for the issue of the Writ must first be endorsed and signed by or on behalf of the solicitor of the Plaintiff or by the Plaintiff if he is acting in person with the following Certificate

Sterling equivalent of Judgment

I we certify that the rate current in London for the purpose of *(state the unit of the foreign currency in which the Judgment is expressed)* at the close of business on the day of 19 *(being the date nearest or most nearly preceding the date of the issue of the Writ of Fi. Fa.)* was to the sterling and at this rate the sum of *(state the amount of Judgment debt in foreign currency)* amounts to £

Dated the day of 19

Signed
(Solicitor for the Plaintiff).

(b) The amount so certified will then be entered in the Writ of Fi. Fa. by adapting R.S.C. Appendix A Form 53 to meet the circumstances of the case but substituting the following recital: Whereas in the above named action it was on the day of 19 adjudged [or ordered] that the Defendant C.D. do pay the Plaintiff A.B. *(state the sum of the foreign currency for which Judgment was entered)* or the sterling equivalent at the time of payment, and whereas the sterling equivalent at the date of issue of this Writ is £ as appears by the Certificate endorsed and signed by or on behalf of the Plaintiff on the Praecipe for the issue of this Writ.

Enforcement of Judgment Debt in Foreign Currency by Garnishee Proceedings

12. (a) Where the Plaintiff desires to proceed to enforce a Judgment expressed in foreign currency by Garnishee proceedings the affidavit made in support of an application for an Order under R.S.C. Order 49 Rule 1 must contain words to the following effect:

The rate current in London for the purchase of *(state the amount of the Judgment in foreign currency)* at the close of business on the ..... day of ..... 19..... was ..... to the £ sterling, and at this rate the said sum of ..... amounts to £..... sterling. I have ascertained the above information *(state the source of the information) and verily believe the same to be true.*

The Master will then make an Order nisi for the sterling equivalent of the Judgment debt as so verified.

(b) Where the Plaintiff desires to attach a debt due or accruing due to the Defendant within the jurisdiction in the same unit of foreign currency as the Judgment debt is itself expressed, the affidavit made in support of an application for an Order under R.S.C. Order 49 Rule 1 must state all the relevant facts relied on and in such event the Master may make the order to attach such debt due or accruing due in *that* foreign currency.

Enforcement of Judgment Debt in Foreign Currency by Other Modes of Enforcement

13. Where the Plaintiff desires to proceed to enforce a Judgment expressed in a foreign currency by other means of enforcement, e.g. by obtaining an order imposing a charge on land or interest in land under R.S.C. Order 50 Rule 1 or by obtaining an order imposing a charge on securities under R.S.C. Order 50 Rule 2, or some other similar order or by obtaining an order for the appointment of a receiver by way of equitable execution, under R.S.C. Rule 51, the affidavit made in respect of any such application shall contain words similar to those set out in paragraph 1(a) above. The Master will then make an Order for the sterling equivalent of the Judgment expressed in foreign currency as so verified by such affidavit.

14. These Directions are issued with the concurrence of the Chief Chancery Master acting on the authority of the Vice-Chancellor so far as they apply to the practice in the Chancery Division, and of the Senior Registrar of the Family Division so far as they apply to the practice in that Division.

I. H. JACOB
Senior Master of the Supreme Court

December 18, 1975

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